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Survey of Washington Search and Seizure Law: 2005 Update

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INTRODUCTION

I am pleased to be joined by Law Review members Linda W.Y. Coburn, Jason Amala, Gordon Hill, Erica Horton, Kylee MacIntyre, Joshua Osborne-Klein, and the rest of the Seattle University Law Review staff, along with Kelly Kunsch of the Seattle University Law Library for his work on the index, and Grace Mottman, my Administrative Assistant, in publishing this Survey of Washington Search and Seizure Law. This marks the fourth publication of the Survey that was originally authored by Justice Robert F. Utter, Washington Supreme Court (retired) in 1985, with updates published in 1988 and 1998.

This Survey is intended to serve as a source to which the Washington lawyer, judge, law enforcement officer, and others can turn to as an authoritative starting point for researching Washington search and seizure law. In order to be useful as a research tool, revisions to the law and new cases interpreting the Washington Constitution and the United States Constitution require periodic updates to this Survey to reflect the current state of the law. Many of these cases involve the Washington Supreme Court's interpretation of the Washington Constitution. Also, as the United States Supreme Court has continued to examine Fourth Amendment search and seizure jurisprudence, its decisions and their reflections on Washington law are also discussed.

Often the rules and approaches in interpreting the Washington Constitution differ in certain areas from the analysis used by the United States Supreme Court in its Fourth Amendment jurisprudence. Where that occurs, this Survey has identified the independent approach adopted by the Washington Supreme Court.

Article I, Section 7 of the Washington Constitution is a counterpart to the Fourth Amendment. That section provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Washington Supreme Court historically applied the analytical framework outlined in *State v. Gunwall*, 106 Wn.2d 54, 61–62, 720 P.2d 808, 811 (1986), in its case-by-case determination of the scope of protection afforded under Article I, Section 7, and in situations where greater individual protection exists under the Washington Constitution than under the Fourth Amendment.

Gunwall adopted the following six neutral interpretive factors: (1) the textual language of the state constitution; (2) the significant differences in the texts of parallel provisions of the federal and state constitutions; (3) the state constitutional and common law history; (4) the preexisting state law; (5) the differences in structure between the federal and

state constitutions; and (6) matters of particular state interest or local concern. *Id.*

This analytical framework adopted in *Gunwall* provides the structure and foundation from which Washington courts continue to define the scope of Article I, Section 7. In more recent cases under Article I, Section 7, the Washington Supreme Court has relaxed the earlier strict requirement that counsel provide a "*Gunwall* analysis" in order to have the court rule on a state constitutional law issue instead of applying, where possible, principles developed in previous cases. *State v. White,* 135 Wn.2d 761, 769, 958 P.2d 982, 986 (1998). Recognizing the structural approach to state constitutional interpretation, however, continues to provide a reasoned approach to resolving issues of state constitutional law.

This Survey contains updated case comments and statutory references that are current through March 2005, and focuses primarily on substantive search and seizure law in the criminal context; it omits discussion of many procedural issues. In addition, all references to Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, have been updated to the Fourth Edition, published in 2004.

—CHARLES W. JOHNSON

CHAPTER 1: TRIGGERING THE FOURTH AMENDMENT AND ARTICLE I, SECTION 7: DEFINING SEARCHES AND SEIZURES

This chapter addresses three questions: (1) what is a search; (2) what is a seizure of the person; and (3) what is a seizure of property?

These questions represent the threshold inquiry in any search or seizure problem. Unless a true search or seizure has occurred within the meaning of the federal or state constitution, constitutional protections are not triggered. This chapter first discusses when a search has occurred, from entries into the home to the taking of blood samples. The chapter then discusses when a seizure of the person has occurred, be it an arrest or an investigatory stop. The chapter concludes with a discussion of when, for constitutional purposes, personal property has been seized.

1.0 DEFINING "SEARCH" PRE-*KATZ*: "CONSTITUTIONALLY PROTECTED AREAS"

Prior to 1967, the United States Supreme Court defined the applicability of Fourth Amendment protections in terms of "constitutionally protected areas." *Berger v. New York*, 388 U.S. 41, 59, 87 S. Ct. 1873, 1883, 18 L. Ed. 2d 1040, 1052 (1967); *Lopez v. United States*, 373 U.S. 427, 438–39, 83 S. Ct. 1381, 1388, 10 L. Ed. 2d 462, 470 (1963); *Silverman v. United States*, 365 U.S. 505, 510–12, 81 S. Ct. 679, 682–83, 5 L. Ed. 2d 734, 738–39 (1961). The Fourth Amendment's guarantees applied only to those searches that intrude into one of the "protected areas" enumerated within the Fourth Amendment: "persons" (including the bodies and clothing of individuals); "houses" (including apartments, hotel rooms, garages, business offices, stores, and warehouses); "papers" (such as letters); and "effects" (such as automobiles). *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 2.1(a), at 422–31 (4th ed. 2004).

However, in *Katz v. United States*, the United States Supreme Court rejected the rigid "constitutionally protected area" test:

> [T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area.". . . [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. 347, 350–52, 88 S. Ct. 507, 510–11, 19 L. Ed. 2d 576, 581–82 (1967). *Katz* thus defined the scope of search protections as the

individual's "reasonable expectation of privacy." 389 U.S. at 360, 88 S. Ct. at 516, 19 L. Ed. 2d at 587 (Harlan, J., concurring). The nature of this new test and the degree of continued vitality of the old "constitutionally protected area" test will be examined in the following sections. *See* 1 LaFave, *supra*, § 2.1, at 422–45.

1.1 DEFINING "SEARCH" POST-*KATZ*: THE "REASONABLE EXPECTATION OF PRIVACY"

In a concurring opinion in *Katz*, which has since come to be accepted as the *Katz* test, Justice Harlan explained that the *Katz* holding extends search and seizure protections to all situations in which a defendant has a "reasonable expectation of privacy." *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 587 (1967) (Harlan, J., concurring); *see* 1 Wayne R. LaFave, *Search and Seizure* § 2.1, at 422–45 (4th ed. 2004). A reasonable expectation of privacy is measured by a "twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 588 (Harlan, J., concurring); *see also Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 2041, 150 L. Ed. 2d 94, 100 (2001); *California v. Greenwood*, 486 U.S. 35, 39, 108 S. Ct. 1625, 1628, 100 L. Ed. 2d 30, 36 (1988); *State v. Carter*, 151 Wn.2d 118, 127, 85 P.3d 887, 891 (2004); *State v. Young*, 123 Wn.2d 173, 189, 867 P.2d 593, 601 (1994) (en banc); *State v. Boot*, 81 Wn. App. 546, 550, 915 P.2d 592, 594 (1996).

In addition, the expectation of privacy must be one "which the law recognizes as 'legitimate.'" *Rakas v. Illinois*, 439 U.S. 128, 143–44 n.12, 99 S. Ct. 421, 430–31 n.12, 58 L. Ed. 2d 387, 401–02 n.12 (1978). The test of "legitimacy" may be just another reformation of the "reasonableness" test, discussed *supra*. *Minnesota v. Olson*, 495 U.S. 91, 95–96, 110 S. Ct. 1684, 1687, 109 L. Ed. 2d 85, 95 (1990) ("A subjective expectation of privacy is legitimate if it is 'one that society is prepared to recognize as reasonable.'") (quoting *Rakas*, 439 U.S. at 143–44 n.12, 99 S. Ct. at 430–31 n.12, 58 L. Ed. 2d at 401–02 n.12).

> A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." . . . Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.

Rakas, 439 U.S. at 143–44 n.12, 99 S. Ct. at 430–31 n.12, 58 L. Ed. 2d at 401–02 n.12; *see also United States v. White*, 401 U.S. 745, 751, 91 S. Ct. 1122, 1126, 28 L. Ed. 2d 453, 458 (1971) (despite actual expectations of privacy, authorities may use testimony of criminal informants consistently with the Fourth Amendment); *State v. Clark*, 129 Wn.2d 211, 226, 916 P.2d 384, 393 (1996) (en banc) ("A person has no expectation of privacy under the Fourth Amendment in a home where illegal business is openly conducted."); *State v. Hastings*, 119 Wn.2d 229, 232, 830 P.2d 658, 660 (1992) (en banc) (no expectation of privacy where illegal business is openly conducted).

In applying this "legitimacy" test, the United States Supreme Court has held that when a police investigative device is capable of detecting only the presence of unlawful articles, the use of the device does not constitute a search. *Illinois v. Caballes*, ___ U.S. ___, ___, 125 S. Ct. 834, 837, ___ L. Ed. 2d ___, ___ (2005) ("any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'") (quoting *United States v. Jacobsen*, 466 U.S. 109, 123, 104 S. Ct. 1652, 1661–62, 80 L. Ed. 2d 85, 100 (1984)). Thus, in federal courts, a canine sniff does not normally constitute a "search." *Caballes*, ___ U.S. at ___, 125 S. Ct. at 838, ___ L. Ed. 2d at ___ (2005) ("[T]he use of a well-trained narcotics-detection dog—one that 'does not expose noncontraband items that otherwise would remain hidden from public view' . . . during a lawful traffic stop, generally does not implicate legitimate privacy interests.") (quoting *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644–45, 77 L. Ed. 2d 110, 121 (1983)).

In contrast, Washington has not adopted the federal Supreme Court's blanket holding that dog sniffs are not searches. *State v. Boyce*, 44 Wn. App. 724, 730, 723 P.2d 28, 31 (1986) ("As long as the canine sniffs the object from an area where the defendant does not have a reasonable expectation of privacy, and the canine sniff itself is minimally intrusive, then no search has occurred."). Washington law requires a case-by-case analysis when officers use sensory-enhancing techniques in the course of their investigations. *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217, 224 (2003) (en banc) (installation of "sense-enhancing" GPS tracking on vehicle constitutes search and seizure under Article I, Section 7); *Young*, 123 Wn.2d at 188 ("a dog sniff might constitute a search if the object of the search or the location of the search were subject to heightened constitutional protection"); *State v. Stanphill*, 53 Wn. App. 623, 631, 769 P.2d 861, 865 (1989) (dog sniff of package at post office is not a search); *State v. Wolohan*, 23 Wn. App. 813, 818, 598 P.2d 421, 424 (1979) (dog sniff of parcel in bus terminal is not a search).

Similarly, in Washington, unlawful activity in a public toilet stall carries no legitimate expectation of privacy. *State v. Berber*, 48 Wn. App. 583, 590–91, 740 P.2d 863, 868–69 (1987) (a police officer's glance over the defendant's shoulder while standing over an open toilet in a public restroom was not a violation of the defendant's privacy rights).

In addition, there is no legitimate expectation of privacy under the Fourth Amendment when one party consents to the recording of a conversation. *United States v. Karo*, 468 U.S. 705, 726, 104 S. Ct. 3296, 3309, 82 L. Ed. 2d 530, 548 (1984); *United States v. Caceres*, 440 U.S. 741, 744, 99 S. Ct.. 1465, 1467, 59 L. Ed. 2d 733, 738 (1979). Thus, a defendant who utilized a telephone answering service whereby both he and the caller were aware that a third party was taking messages had no reasonable expectation of privacy in the recorded message and, thus, no search occurred when the records were subpoenaed. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220, 226 (1979). See *infra* §1.3(a) for a discussion of *State v. Gunwall*, 106 Wn.2d 54, 68–69, 720 P.2d 808, 816 (1986) (en banc) (holding that the use of pen registers to record telephone numbers dialed without valid legal process in violation of Article I, Section 7).

Similarly, Washington courts have found that there is no Article I, Section 7 violation when a party consents to the recording of a conversation. *Clark*, 129 Wn.2d at 221; *State v. Pulido*, 68 Wn. App. 59, 63, 841 P.2d 1251, 1253 (1992). The Washington Legislature has specifically allowed law enforcement agencies to record conversations when the parties have consented to the recording. RCW 9.73.030(1)(a) ("[I]t shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . [p]rivate communication transmitted by telephone, telegraph, radio, or other device between two or more individuals . . . *without first obtaining the consent of all the participants in the communication.*") (emphasis added).

In *State v. Townsend*, the Washington Supreme Court gave an expansive reading to RCW 9.73.030(1)(a), holding that a party has "consented" to the recording of electronic messaging communications if the party has knowledge that the communications will be recorded. 147 Wn.2d 666, 676, 57 P.3d 255, 260 (2002) (en banc). Accordingly, because the *Townsend* defendant, at a minimum, constructively knew that his attempts to arrange sexual encounters with a minor over an Internet instant messaging service were automatically recorded by the receiving computer, the defendant was deemed to have consented to the recording of the communications. *Id.*; *see also In re Marriage of Farr*, 87 Wn.

App. 177, 184, 940 P.2d 679, 682–83 (1997) (holding that because an answering machine's only purpose is to record messages, a defendant who has knowingly left messages on the answering machine has implicitly consented to the recording and has no reasonable expectation of privacy as to the recording).

1.2 DEFINING "SEARCH" POST-*KATZ*: CONTINUING VITALITY OF "CONSTITUTIONALLY PROTECTED AREAS"

Although the concept of "constitutionally protected areas" does not "serve as a talismanic solution to every Fourth Amendment problem," *Katz v. United States*, 389 U.S. 347, 351 n.9, 88 S. Ct. 507, 511 n.9, 19 L. Ed. 2d 576, 582 n.9 (1967), the concept retains considerable clout. The United States Supreme Court has referred to "constitutionally protected areas" since *Katz* and has given special deference to the areas specifically enumerated within the Fourth Amendment. For example, the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home, absent exigent circumstances, to effect a routine felony arrest. *Payton v. New York*, 445 U.S. 573, 576, 100 S. Ct. 1371, 1374–75, 63 L. Ed. 2d 639, 644 (1980); *see also Kyllo v. United States*, 533 U.S. 27, 34, 121 S. Ct. 2038, 2043, 150 L. Ed. 2d 94, 102 (2001) ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' constitutes a search—at least where (as here) the technology in question is not in general public use.'") (citation omitted).

The Fourth Amendment protects an individual's privacy in a variety of settings. In no setting is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." U.S. Const. amend. IV. That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511, 81 S. Ct. 679, 683, 5 L. Ed. 2d 734, 739 (1961); *see also Kyllo*, 533 U.S. at 34, 121 S. Ct. at 2043, 150 L. Ed. 2d at 102 ("[I]n the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*."). In terms that apply equally to seizures of property and seizures of persons, courts have drawn the Fourth Amendment line at the

entrance to the house. *Silverman*, 365 U.S. at 511, 81 S. Ct. at 683, 5 L. Ed. 2d at 739. Article I, Section 7 of the Washington Constitution has a similar emphasis on protection of privacy in private homes. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, *or his home invaded*, without authority of law.") (emphasis added); *see also State v. Ferrier*, 136 Wn.2d 103, 112, 960 P.2d 927, 931 (1998) (en banc) ("'the closer officers come to intrusion into a dwelling, the greater the constitutional protection'") (quoting *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593, 599 (1994) (en banc)); *State v. Groom*, 133 Wn.2d 679, 685, 947 P.2d 240, 244 (1997) (en banc) ("Article I, section 7 is more protective of the home than is the Fourth Amendment"); *State v. Solberg*, 122 Wn.2d 688, 699, 861 P.2d 460, 466 (1993) (en banc) (the state constitution prohibits police officers from arresting a suspect without a warrant while the suspect is standing within the doorway of a residence); *State v. Weller*, 76 Wn. App. 165, 167, 884 P.2d 610, 612 (1994) (the defendant's porch was not a constitutionally protected area). Houses, then, are "constitutionally protected areas" because, as under the pre-*Katz* analysis, "houses" are specifically enumerated in the Fourth Amendment and Article I, Section 7 of the Washington Constitution.

However, while "[t]he Fourth Amendment generally prohibits the warrantless entry of a person's home," this prohibition does not apply where the police obtain voluntary consent, either from the individual whose property is searched, or from a third person who possesses common authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148, 156 (1990). Under the Fourth Amendment, the police may reasonably rely on the apparent authority of the person consenting to the entry. *Id.* at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. *But see State v. Leach*, 113 Wn.2d 735, 738, 782 P.2d 1035, 1037 (1989) (en banc) (implied consent by a third party is ineffective where a suspect is present and objecting to the search).

Under Article I, Section 7, in certain circumstances the duty of an officer to obtain consent is greater than under the Fourth Amendment. For example, in *Ferrier*, the Washington Supreme Court considered the validity of a "knock and talk" procedure, in which police officers obtain consent to conduct a warrantless search of a residence by knocking on the resident's door and asking for permission to enter and search the house. 136 Wn.2d at 106. The *Ferrier* court held that, while consent is an exception to the Article I, Section 7 requirement of a search warrant, the burden is on the state to prove that consent was obtained. *Id.* at 111.

In addition, the *Ferrier* court held that the officer's failure to warn the defendant that she had the right to refuse consent "violated [the defendant's] state constitutional right to privacy in her home and, thus, viti-

ated the consent she gave." *Id.* at 115. However, the stricter *Ferrier* consent rule is not applicable in other circumstances. *See State v. Thang*, 145 Wn.2d 630, 636–37, 41 P.3d 1159, 1162 (2002) (en banc) (if officers do not intend to search a residence without a warrant, the *Ferrier* rule is inapplicable, and the court should apply a "totality of the circumstances" test); *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590, 598–99 (1999) (en banc) (officer accompanying INS investigation need not follow the *Ferrier* "knock and talk" rule); *State v. Khounvichai*, 110 Wn. App. 722, 728, 42 P.3d 1000, 1003 (2002) (*Ferrier* rule is limited to "situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant").

1.3 Specific Applications of Post-*Katz* Analysis

1.3(a) Residential Premises

As described above, an individual has a privacy interest in the interior of his or her home. *See, e.g., Payton v. New York*, 445 U.S. 573, 589–90, 100 S. Ct. 1371, 1381–82, 63 L. Ed. 2d 639, 652–53 (1980); *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) (en banc); 1 Wayne R. LaFave, *Search and Seizure* § 2.3(b), at 565–72 (4th ed. 2004). Although "a man's home is, for most purposes, a place where he expects privacy . . . objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *State v. Clark*, 129 Wn.2d 211, 229–30, 916 P.2d 384, 394 (1996) (en banc) (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 587–88 (1967)); *see also State v. Ross*, 141 Wn.2d 304, 313, 4 P.3d 130, 135 (2000) (en banc) ("Under the 'open view' doctrine, detection by an officer who is lawfully present at the vantage point and able to detect something by utilization of one or more of his senses does not constitute a search within the meaning of the Fourth Amendment."); *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280, 283 (1996) (en banc) (where the "open view" doctrine is satisfied, the object under observation is not subject to any reasonable expectation of privacy; no violation was found where the officer looked through an unobstructed window of the defendant's mobile home with the aid of a flashlight); *State v. Smith*, 118 Wn. App. 480, 484–85, 93 P.3d 877, 879 (2003) (a person does not have a reasonable expectation of privacy in areas of a home's curtilage impliedly open to the public); *State v. Drumhiller*, 36 Wn. App. 592, 595, 675 P.2d 631, 633 (1984) (legitimate expectation of privacy means more than subjective expectation of not being discovered; defendants' claimed privacy expectation in home was not reasonable when defendants posi-

tioned themselves in front of a picture window with the lights on and drapes open). See *infra* § 5.6 for a discussion of the plain view doctrine.

A search of a home can occur even when government officers do not themselves enter the home. Specifically, a search can occur when the "[g]overnment uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 2046, 150 L. Ed. 2d 94, 106 (2001). Similarly, a search occurs, triggering the Fourth Amendment, when the government monitors an electronic device to determine whether a particular article or person is within an individual's home at a particular time. *United States v. Karo*, 468 U.S. 705, 714–15, 104 S. Ct. 3296, 3302–03, 82 L. Ed. 2d 530, 541 (1984); *see also Clinton v. Virginia*, 377 U.S. 158, 158, 84 S. Ct. 1186, 1186, 12 L. Ed. 2d 213, 213 (1964) (Clark, J., concurring) (the Fourth Amendment is implicated when a microphone used by police officers "penetrate[s]" the petitioner's premises in a manner sufficient to constitute trespass). Consistent with the federal courts' analysis, the Washington Supreme Court has held that infrared surveillance of a home was a search in violation of the Fourth Amendment. *State v. Young*, 123 Wn.2d 173, 186, 867 P.2d 593, 599–600 (1994) (en banc).

The privacy interest in a home is not confined to houses, but extends to other types of residences. *See, e.g., Stoner v. California*, 376 U.S. 483, 490, 84 S. Ct. 889, 893, 11 L. Ed. 2d 856, 861 (1964) (hotel rooms); *State v. Murray*, 84 Wn.2d 527, 534, 527 P.2d 1303, 1308 (1974) (en banc) (apartments); *State v. Davis*, 86 Wn. App. 414, 419, 937 P.2d 1110, 1113 (1997) (motel rooms). There is a reduced expectation of privacy in motor vehicles that are readily mobile but can also be used for sleeping. *California v. Carney*, 471 U.S. 386, 389, 105 S. Ct. 2066, 2068, 85 L. Ed. 2d 406, 412 (1985) (mobile motor home); *see also State v. Gluck*, 83 Wn.2d 424, 427, 518 P.2d 703, 706 (1974) (en banc) ("[W]hat may be an unreasonable search of a house may be reasonable in the case of a motor car.").

In addition, there is a reduced privacy interest when several persons or families occupy premises in common rather than individually, e.g., tenants sharing common living quarters but maintaining separate bedrooms. *State v. Alexander*, 41 Wn. App. 152, 155–56, 704 P.2d 618, 620 (1985).

The expectation of privacy in residential premises may persist even when a home is fire-damaged and arson is suspected. *Michigan v. Clifford*, 464 U.S. 287, 292, 104 S. Ct. 641, 646, 78 L. Ed. 2d 477, 483 (1984); *State v. Carey*, 42 Wn. App. 840, 852–53, 714 P.2d 708, 714 (1986).

A person may relinquish the privacy interest in an activity or object in the home by making the activity or object observable to persons outside. *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127, 131 (2002) (en banc) ("[I]f an officer detects something by using one or more of his or her senses, while lawfully present at the vantage point where those senses are used, no search has occurred."); *Drumhiller*, 36 Wn. App. at 595 (defendants had no reasonable privacy interest in activity in their home when they positioned themselves in front of picture window with lights on and drapes open). *Cf. State v. Jordan*, 29 Wn. App. 924, 927, 631 P.2d 989, 991 (1981) ("The fact that the occupants had not completely succeeded in shutting the curtains does not diminish the reasonableness of their expectation of privacy."). However, a person does not relinquish the privacy interest in the home by opening the door in response to a police officer's knock. *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89, 91 (1985) (en banc); *see also State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998) (en banc).

Furthermore, persons may waive their right to privacy by willingly admitting a visitor, e.g., an undercover police officer, into the premises to conduct an illegal transaction. Thus, the Washington Supreme Court found that a defendant waived any right to privacy by willingly admitting a stranger into a motel room to conduct a drug transaction. *State v. Carter*, 127 Wn.2d 836, 848, 904 P.2d 290, 296 (1995) (en banc); *see also State v. Dalton*, 43 Wn. App. 279, 284–85, 716 P.2d 940, 944 (1986) (student invited officer into college dormitory to conduct an illegal drug transaction; warrantless entry upheld as nonintrusive since police were invited in and took nothing except what would have been taken by a willing purchaser).

People using their home telephones have no Fourth Amendment privacy interest in the phone numbers dialed, *Smith v. Maryland*, 442 U.S. 735, 745–46, 99 S. Ct. 2577, 2582, 61 L. Ed. 2d 220, 230 (1979), nor is there a privacy interest in the contents of a phone call when a recording machine's speaker makes incoming calls audible to anyone present in the room. *United States v. Whitten*, 706 F.2d 1000, 1011 (9th Cir. 1983); *see also In re Marriage of Farr*, 87 Wn. App. 177, 184, 940 P.2d 679, 682–83 (1997) (holding that because an answering machine's only purpose is to record messages, a defendant who has knowingly left messages on the answering machine has implicitly consented to the recording of the message).

The Washington Constitution, however, provides broader protection to a telephone user's privacy interests than does the federal constitution. *State v. Gunwall*, 106 Wn.2d 54, 69, 720 P.2d 808, 816 (1986) (en banc) (specifically overruling *Bixler v. Hille*, 80 Wn.2d 668, 497 P.2d

594 (1972) (en banc), which held that a pen register does not intercept telephonic communications, and declining to follow *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979)). The *Gunwall* court found that a home telephone customer's privacy rights under Article I, Section 7 were violated when the police, without valid legal process, obtained by means of pen register or other device, a record of the local and long distance telephone numbers dialed on the customer's telephone. *Id.* at 68–69. A pen register is a device that records or decodes electronic or other impulses that identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached. *See* 18 U.S.C. § 3127(3). The *Gunwall* court also considered whether the police may obtain telephone toll records and held that toll records could only be secured under "authority of law," which includes legal process such as a search warrant or subpoena. *Gunwall*, 106 Wn.2d at 69.

Courts in some jurisdictions have held that common hallways of multiple-dwelling buildings that are accessible to the public are not protected areas. *See, e.g.*, *United States v. Acosta*, 965 F.2d 1248, 1252–53 (3d Cir. 1992); 1 LaFave, *supra*, § 2.3(b), at 565–72. Even if a building is secure and not accessible to the public, some courts have found no reasonable expectation of privacy to the common hallways. *See, e.g.*, *United States v. Nohara*, 3 F.3d 1239, 1240, 1242 (9th Cir.1993) (apartment dweller of "high security" apartment building has no reasonable expectation of privacy in the common areas of the building; search is valid even though officer trespassed). *But see State v. Breuer*, 577 N.W.2d 41, 46–47 (Iowa 1998) (expectation of privacy is reasonable in the hallway of an apartment building that only has two units and visitors usually wait at the outer door before entering the building); *People v. Beachman*, 98 Mich. App. 544, 552, 296 N.W.2d 305, 308 (1980) (Fourth Amendment protections extend to the lobby of a locked residential hotel). *See generally* 1 LaFave, *supra*, § 2.3(b), at 565–72.

The Fourth Amendment is also triggered when an officer enters a person's home to search for someone who does not live there. *See Steagald v. United States*, 451 U.S. 204, 213–14, 101 S. Ct. 1642, 1648, 68 L. Ed. 2d 38, 46 (1981); *see also State v. Williams*, 142 Wn.2d 17, 24, 11 P.3d 714, 718 (2000) (en banc) (citing *Steagald* with approval).

In addition, the Fourth Amendment is triggered when a housing inspector enters to conduct an administrative search. *See Camara v. Municipal Court*, 387 U.S. 523, 534, 87 S. Ct. 1727, 1730–31, 18 L. Ed. 2d 930, 935 (1967); *City of Seattle v. McCready*, 124 Wn.2d 300, 309, 877 P.2d 686, 691 (1994) (en banc); *see also Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 805 (9th Cir. 2001) ("[T]he Washington Constitution requires a Washington statute, court rule, or judicial

opinion authorizing the issuance of [administrative] warrants."). However, in Washington, municipal courts have no "inherent authority to issue administrative search warrants." *McCready*, 124 Wn.2d at 309. Thus, Washington courts "must rely on an authorizing statute or court rule" for such authority. *Id.* Accordingly, in *McCready*, the court found that in the absence of a statute or court rule authorizing the issuance of warrants for *civil* infractions, Washington courts are limited to issuing administrative warrants to search for evidence of a *crime*. *Id.* at 309–10. *See infra* § 2.9(a).

1.3(b) Related Structures: The Curtilage

The "curtilage" of residential premises consists of "all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling, and is habitually used for family purposes." *United States v. Potts*, 297 F.2d 68, 69 (6th Cir. 1961); *see also State v. Dodson*, 110 Wn. App. 112, 123, 39 P.3d 324, 331 (2002) ("Open curtilage is that area apparently open to the public, such as the driveway, the walkway, or any access route leading to the residence."). Prior to *Katz*, the curtilage served as the controlling standard of an individual's privacy interest: Structures within the curtilage were protected and structures outside the curtilage were not. *See* 1 LaFave, *supra,* § 2.3(d), at 587–90 (4th ed. 2004). In the aftermath of *Katz*, the curtilage has been considered "part of [the] home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 104 S. Ct. 1735, 1742, 80 L. Ed. 2d 214, 225 (1984).

The United States Supreme Court has identified four factors that should be reviewed in determining the extent of a residence's curtilage:

> [T]he proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301, 107 S. Ct. 1134, 1139, 94 L. Ed. 2d 326, 334–35 (1987). The *Dunn* Court expressly declined to adopt a "bright-line" rule that the curtilage extends no farther than the nearest fence surrounding a fenced house. *Id.* at 301 n.4, 107 S. Ct. at 1140 n.4, 94 L. Ed. 2d at 335 n.4. Rather, a court is to use the factors identified above as a tool in determining whether the area in question is so intimately tied to the home as to fall within "the home's 'umbrella' of

Fourth Amendment protection." *Id.* at 301, 107 S. Ct. at 1140, 94 L. Ed. 2d at 335.

However, the expectation of privacy in structures located and viewed from outside the curtilage, but on private property, is the same as the expectation of privacy in those structures viewed from public places. *Id.* at 304, 107 S. Ct. at 1141, 94 L. Ed. 2d at 337. Thus, in *Dunn*, the Court held that police officers standing in an open field could look into the defendant's barn, even if the defendant had a reasonable expectation of privacy in the barn. *Id. See also* 1 LaFave, *supra*, § 2.3(d)–(e), at 587–98.

Similarly, Washington courts have not recognized a privacy interest in those areas of the curtilage that are impliedly open to the public. *See State v. Thompson*, 151 Wn.2d 793, 807, 92 P.3d 228, 235 (2004) (en banc) ("It is clear that the police with legitimate business may enter areas of curtilage which are impliedly open. In so doing, the police are free to use their senses."); *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130, 135 (2000) (en banc) ("An officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, is permitted to enter the curtilage areas of a private residence which are impliedly open, such as access routes to the house."); *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280, 283 (1996) (en banc) (officer entitled to walk up onto a porch which was the usual access route to the house); *see also State v. Chaussee*, 72 Wn. App. 704, 709–10, 866 P.2d 643, 647 (1994) (no expectation of privacy in common access road leading to defendant's residence). A court will, however, consider a combination of factors when analyzing the admissibility of evidence, including whether police officers have done the following: (1) spied into the residence; (2) acted secretly; (3) acted after dark; (4) used the most direct access route; (5) tried to contact the resident; (6) created an artificial vantage point; or (7) made the discovery accidentally. *State v. Myers,* 117 Wn.2d 332, 345, 815 P.2d 761, 769 (1991) (en banc) (citing *State v. Seagull*, 95 Wn.2d 898, 905, 632 P.2d 44, 50 (1981) (en banc)); *see also State v. Niedergang*, 43 Wn. App. 656, 662, 719 P.2d 576, 579 (1986) (car parked in cul-de-sac not within curtilage). However, a court will not apply these factors as a fixed formula. *Ross*, 141 Wn.2d at 309 n.1.

1.3(c) Adjoining Lands and "Open Fields"

Certain lands adjacent to a dwelling fall within the privacy protection surrounding the residence. Thus, "[t]he protection afforded by the Fourth Amendment, insofar as houses are concerned, has never been restricted to the interior of the house, but has extended to open areas immediately adjacent thereto." *Wattenburg v. United States*, 388 F.2d 853,

857 (9th Cir. 1968) (reasonable expectation of privacy extends to backyard of lodge); *see also Oliver v. United States*, 466 U.S. 170, 178, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214, 224 (1984) (individual may have legitimate expectation of privacy in "area immediately surrounding the home"). *But see United States v. Basile*, 569 F.2d 1053, 1056 (9th Cir. 1978) ("The Fourth Amendment protection against unreasonable searches and seizures does not extend to open fields."). The applicability of federal search and seizure protections to areas immediately surrounding the home is determined by the *Katz* test of reasonable expectation of privacy. 1 LaFave, *supra*, § 2.3(f), at 598–606 (4th ed. 2004).

Adjoining lands that are used as normal access routes by the general public are only "semi-private" and therefore do not always enjoy Fourth Amendment protections. *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 865, 94 S. Ct. 2114, 2115–16, 40 L. Ed. 2d 607, 611 (1974); *United States v. Magana*, 512 F.2d 1169, 1171 (9th Cir. 1975). Thus, Fourth Amendment protections will not apply to a police investigation that is restricted to places where visitors could be expected to go. *State v. Dodson*, 110 Wn. App. 112, 123, 39 P.3d 324, 331 (2002); *State v. Gave*, 77 Wn. App. 333, 337, 890 P.2d 1088, 1090 (1995) (driveway, walkway, or access routes leading to residence or to porch of residence are all areas of "curtilage" impliedly open to the public); *see also State v. Solberg*, 122 Wn.2d 688, 698–99, 861 P.2d 460, 465 (1993) (en banc) (unenclosed front porch held to be a public place, not a constitutionally protected area); *State v. Graffius*, 74 Wn. App. 23, 24, 871 P.2d 1115, 1118 (1994) (driveway commonly used for guests and members of the public not protected); *State v. Coburne*, 10 Wn. App. 298, 314, 518 P.2d 747, 757 (1973) (apartment building common parking lot not protected).

On the other hand, when the police enter onto adjoining lands that are not used as an access area by the general public, the Fourth Amendment guarantees do apply. For example, a Washington court found that a warrantless intrusion into a backyard, which was enclosed by a six-foot fence and padlocked gate, violated the Fourth Amendment. *State v. Mierz*, 72 Wn. App. 783, 791, 866 P.2d 65, 70–71 (1994), *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995); *see also Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974) (backyard behind a four-unit apartment building, which is not used as a common passageway by tenants, is protected). *But see State v. Niedergang*, 43 Wn. App. 656, 662, 719 P.2d 576, 579 (1986) (car parked in common area near suspect's dwelling was not considered within curtilage).

Under the old "constitutionally protected areas" analysis, the privacy protections did not apply to "open fields." *Hester v. United States*,

265 U.S. 57, 59, 44 S. Ct. 445, 446, 68 L. Ed. 898, 900 (1924). Consequently, a defendant could not invoke constitutional privacy protections with respect to police intrusions onto open fields, wooded areas, vacant lots in urban areas, open beaches, reservoirs, or open waters. *See* 1 LaFave, *supra*, § 2.4(a), at 617–26.

The "open fields" doctrine has been reaffirmed under the *Katz* analysis on the grounds that an expectation of privacy in open fields is unreasonable. *Oliver*, 466 U.S. at 179, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224 ("[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance."). Moreover, a person in possession of land falling within the purview of the open fields doctrine cannot create a legitimate expectation of privacy in the area by taking steps to conceal activities such as posting "no trespassing" signs or erecting fences around the secluded areas. *Id.* at 182, 104 S. Ct. at 1743, 80 L. Ed. 2d at 227 (issue was whether "government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment"); *Dodson*, 110 Wn. App. at 123 (presence of "no trespassing" signs is not dispositive of the homeowner's reasonable expectation of privacy).

Even land within the curtilage may be protected only from certain types of surveillance. Thus, aerial surveillance is not precluded merely because precautions have been taken against ground surveillance. *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 1812, 90 L. Ed. 2d 210, 217 (1986) (aerial surveillance of marijuana growing in a fenced backyard does not implicate Fourth Amendment and officer's observations were merely from a public vantage point); *see also Florida v. Riley*, 488 U.S. 445, 450, 109 S. Ct. 693, 696–97, 102 L. Ed. 2d 835, 842 (1989) (surveillance of a residential backyard by a helicopter is not a "search" requiring warrant under Fourth Amendment). However, if highly sophisticated equipment is used in conducting the aerial surveillance, the Fourth Amendment may be implicated. *Dow Chem. Co. v. United States,* 476 U.S. 227, 238, 106 S. Ct. 1819, 1826, 90 L. Ed. 2d 226, 238 (1986).

In addition, the fact that police commit a common law trespass while observing an object or activity in an open field does not render the intrusion a search under the federal constitution. *Oliver*, 466 U.S. at 183, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224–25. Thus, an intrusion may be onto the land itself as well as by aerial surveillance and yet still not be considered a search. *Id.* at 177, 104 S. Ct. at 1741, 80 L. Ed. 2d at 224–25.

Under the Washington Constitution, aerial surveillance at certain altitudes without the aid of enhancement devices does not constitute a

search. *State v. Cord*, 103 Wn.2d 361, 365, 693 P.2d 81, 87 (1985) (aerial surveillance of defendant's property at an altitude of 3,400 feet without the aid of visual enhancement devices does not constitute a search, even though surveillance was conducted with the aim of discovering marijuana plants); *State v. Myrick*, 102 Wn.2d 506, 514, 688 P.2d 151, 155 (1984) (en banc) (observation of defendant's marijuana plants at an altitude of 1,500 feet with the unaided eye was not a search); *State v. Wilson*, 97 Wn. App. 578, 581, 988 P.2d 463, 465 (1999) ("Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude.").

The relevant inquiry under Article I, Section 7, however, is not whether the observed object was in a "protected place" or whether the defendant had a legitimate and subjective expectation of privacy in the observed location; rather, the appropriate inquiry is whether "the State unreasonably intruded into the defendant's 'private affairs.'" *Myrick*, 102 Wn.2d at 510; *Wilson*, 97 Wn. App. at 581; *see also State v. Cockerell*, 102 Wn.2d 561, 566, 689 P.2d 32, 36–37 (1984) (en banc) (holding that while an aerial surveillance at the altitude of 800 feet was acceptable, a second plane that flew at an altitude of 200 feet was an "unreasonable intrusive overflight"). The nature of the property may also be a factor in determining what constitutes "private affairs," but the fact that the location of the search is an open field is not conclusive. *Myrick*, 102 Wn.2d at 513.

Moreover, the Washington Supreme Court has suggested that even when an individual has no subjective expectation of privacy, an intrusion may nevertheless constitute a search. Thus, "merely because it is generally known that the technology exists to enable police to view private activities from an otherwise nonintrusive vantage point, it does not follow that these activities are without protection." *State v. Young*, 123 Wn.2d 173, 186, 867 P.2d 593, 599 (1994) (en banc) (citing *Myrick*, 102 Wn.2d at 513). The focus is on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202, 205 (2004) (en banc) (quoting *Myrick*, 102 Wn.2d at 511); *see also Cord*, 103 Wn.2d at 365; *State v. Seagull*, 95 Wn.2d 898, 903, 632 P.2d 44, 47 (1981) (en banc). In both *Cord* and *Myrick* the police used no visual enhancement devices; in addition, their vantage points for observing the contraband were lawful. *Cord*, 103 Wn.2d at 365; *Myrick*, 102 Wn.2d at 514; *see also State v. Hanson*, 42 Wn. App. 755, 762, 714 P.2d 309, 314, *aff'd*, 107 Wn.2d 331, 728 P.2d 593 (1986) (search warrant for marijuana fields obtained by use of photos and testimony of officer taken

from a "plain view" vantage point was sufficient); *State v. Jeffries*, 105 Wn.2d 398, 413–14, 717 P.2d 722, 731 (1986) (en banc) ("storage areas" that are visible to the naked eye will not be protected by either state or federal provisions against search and seizure); *cf. Oliver*, 466 U.S. at 183, 104 S. Ct. at 1743–44, 80 L. Ed. 2d at 227 ("Nor is the government's intrusion upon an open field a 'search' in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate."). For a general discussion of aerial surveillance, see Bradley W. Foster, *Warrantless Aerial Surveillance and the Right to Privacy: The Flight of the Fourth Amendment*, 56 J. Air Law & Com. 719 (1991); 1 LaFave, *supra*, § 2.7, at 728–85.

1.3(d) Business and Commercial Premises

The Fourth Amendment privacy protections extend to most business and commercial premises. *Dow Chemical Co. v. United States*, 476 U.S. 227, 235, 106 S. Ct. 1819, 1825, 90 L. Ed. 2d 226, 235 (1986); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311, 98 S. Ct. 1816, 1819, 56 L. Ed. 2d 305, 310 (1978) (OSHA inspector's entry into the nonpublic working areas of electrical and plumbing business constituted a search); *Mancusi v. DeForte*, 392 U.S. 364, 368, 88 S. Ct. 2120, 2124, 20 L. Ed. 2d 1154, 1159 (1968) (union official has reasonable expectation of privacy in his or her office, even when it is shared with other union officials); *see also See v. City of Seattle*, 387 U.S. 541, 545–46, 87 S. Ct. 1737, 1740–41, 18 L. Ed. 2d 943, 947–48 (1967) (absent consent or emergency, administrative inspectors ordinarily must obtain special administrative warrants in order to conduct routine inspections of commercial buildings for possible health and safety violations). However, unlike searches of private homes, the legislature may authorize warrantless administrative searches of commercial property without violating the Fourth Amendment. *New York v. Burger*, 482 U.S. 691, 702, 107 S. Ct. 2636, 2644, 96 L. Ed. 2d 601, 614 (1987). If the legislative authorization does not contain rules governing the procedure that inspectors must follow, however, general Fourth Amendment restrictions will apply. *Donovan v. Dewey*, 452 U.S. 594, 599, 101 S. Ct. 2534, 2538, 69 L. Ed. 2d 262, 269 (1981). One of the factors considered in determining whether warrantless administrative inspections are allowed is whether a business has been extensively regulated historically (such as businesses dealing with liquor and firearms). *Burger*, 482 U.S. at 707, 107 S. Ct. at 2646, 96 L. Ed. 2d at 617 (automobile junkyards have historically been regulated); *Barlow's*, 436 U.S. at 313, 98 S. Ct. at 1821, 56 L. Ed. 2d at 312 (distin-

guishing the liquor and firearms industries from ordinary businesses on the basis of "a long tradition of close government supervision").

The nature of the place as either a personal residence or business may also affect the determination of whether an area is curtilage or an open field. *Dow Chemical Co.*, 476 U.S. at 229, 106 S. Ct. at 1827, 90 L. Ed. 2d at 238. If portions of business and commercial premises are open to the public for inspection of wares, they are not considered private. "[A]s an ordinary matter law enforcement officials may accept a general public invitation to enter commercial premises for purposes not related to the trade conducted thereupon . . . ." *United States v. Berrett*, 513 F.2d 154, 156 (1st Cir. 1975). Thus, the warrantless entry into the public lobby of a motel or restaurant for the purpose of serving an administrative subpoena is permitted although the "administrative subpoena itself [does] not authorize either entry or inspection of [the] premises . . . ." *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 413–14, 104 S. Ct. 769, 772–73, 78 L. Ed. 2d 567, 572 (1984) (an employer may not insist on a judicial warrant as a condition precedent to a valid administrative subpoena unless government inspectors seek nonconsensual entry into "areas not open to the public").

Courts have generally upheld police investigative entries into bus terminals, pool halls, bars, restaurants, and general stores such as furniture stores and variety stores. 1 Wayne R. LaFave, *Search and Seizure* § 2.4(b), at 626–38 (4th ed. 2004). But "[t]he 'implied invitation for customers to come in' . . . extends only to those times when the premises are in fact 'open to the public'; the mere fact that certain premises are open to the public at certain times does not justify entry by the police on other occasions." *Id.*

Although a reasonable expectation of privacy exists in commercial premises, the warrant requirements for administrative searches of commercial premises may differ from those for searches in general. *See infra* § 6.4(b); *see also* 1 LaFave, *supra*, § 2.4(b), at 626–38.

1.3(e) Automobiles and Other Motor Vehicles

Constitutional protections against unreasonable searches apply to automobiles and other motor vehicles. *California v. Carney*, 471 U.S. 386, 390, 105 S. Ct. 2066, 2068, 85 L. Ed. 2d 406, 412 (1985). These protections apply because "automobiles are 'effects' under the Fourth Amendment, and searches and seizures of automobiles are therefore subject to the constitutional standard of reasonableness." *United States v. Chadwick*, 433 U.S. 1, 12, 97 S. Ct. 2476, 2484, 53 L. Ed. 2d 538, 548 (1977). However, while in automobiles, both passengers and drivers pos-

sess a reduced expectation of privacy. *Wyoming v. Houghton*, 526 U.S. 295, 303, 119 S. Ct. 1297, 1302, 143 L. Ed. 2d 408, 416 (1999).

The pervasive regulation of automobiles may dilute the reasonable expectation of privacy that exists with respect to other property. *See Carney*, 471 U.S. at 386, 105 S. Ct. at 2069, 85 L. Ed. 2d at 414; *see also Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 889, 157 L. Ed. 2d 843, 850 (2004) ("The Fourth Amendment does not treat a motorist's car as his castle."). Thus, a person does not have as great an expectation of privacy in a vehicle as in a home. *Id.* Even so, "[a] citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." *New York v. Class*, 475 U.S. 106, 112, 106 S. Ct. 960, 965, 89 L. Ed. 2d 81, 89 (1986). However, when a vehicle is used as a home, its owner has a lesser expectation of privacy when that vehicle is readily mobile and licensed to operate on public streets. *Carney*, 471 U.S. at 393, 105 S. Ct. at 2070, 85 L. Ed. 2d at 414 (mobile home in public lot was treated as a vehicle); *cf. State v. Johnson*, 128 Wn.2d 431, 449, 909 P.2d 293, 303 (1996) (en banc) (lessened privacy interest for sleeper compartment of a tractor-trailer rig).

Passengers in automobiles have an expectation of privacy that is independent of the driver. Thus, even when a driver is under arrest, "where officers do not have articulable suspicion that an individual is armed or dangerous and have nothing to *independently* connect such person to illegal activity," a search of a passenger in an automobile is invalid. *State v. Parker*, 139 Wn.2d 486, 498, 987 P.2d 73, 80 (1999) (en banc).

The lesser expectation of privacy in a vehicle does not automatically extend to closed containers within the vehicle. *Chadwick*, 433 U.S. at 13, 97 S. Ct. at 2484, 53 L. Ed. 2d at 549. Nevertheless, a warrantless search of containers does not violate the Fourth Amendment if officers have probable cause to believe that the containers are concealing contraband. *Houghton*, 526 U.S. at 300, 119 S. Ct. at 1300, 143 L. Ed. 2d at 414; *see also State v. Stroud*, 106 Wn.2d 144, 150, 152, 720 P.2d 436, 440, 441 (1986) (en banc) ("During the arrest process . . . officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.") (overruling *State v. Ringer*, 100 Wn.2d 686, 674 P.2d 1240 (1983) (en banc)).

1.3(f) Personal Characteristics

The Fourth Amendment protects the right of the people to be secure in their persons against unreasonable searches and seizures. Personal characteristics such as facial features and voice tone, which are continu-

ally exposed to the public, generally do not fall within this constitutional protection because an individual has no reasonable expectation that these characteristics will remain private.

> In *Katz v. United States* . . . [the Court] said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office." (citation omitted). The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice any more than he can reasonably expect that his face will be a mystery to the world.

United States v. Dionisio, 410 U.S. 1, 14, 93 S. Ct. 764, 771, 35 L. Ed. 2d 67, 79 (1973) (subpoena of voice exemplars does not infringe on protected Fourth Amendment interests). The Court reached the same result in *United States v. Mara*, 410 U.S. 19, 21, 93 S. Ct. 774, 776, 35 L. Ed. 2d 99, 103 (1973), in which the witness was required to furnish handwriting samples. Likening a person's voice to a person's facial characteristics, the Court held that "[h]andwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." *Id.*; *see also Bedford v. Sugarman*, 112 Wn.2d 500, 512, 772 P.2d 486, 492 (1989) (en banc) (shelter program which required indigent alcoholics and drug addicts to move into shared shelters in order to receive benefits did not violate the right to privacy because it did not require shelter residents to "disclose intimate personal information to obtain shelter benefits").

In contrast to the seizure of voice exemplars and facial characteristics, the taking of blood, urine, or DNA samples is considered a search within the meaning of the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S. 67, 76, 121 S. Ct. 1281, 1287, 149 L. Ed. 2d 205, 215 (2001) (urine samples); *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 918 (1966) (blood samples); *State v. Surge*, 122 Wn. App. 448, 454, 94 P.3d 345, 348 (2004) (DNA samples); *State v. Baldwin*, 109 Wn. App. 516, 523, 37 P.3d 1220, 1224 (2001) (blood samples); *Robinson v. City of Seattle*, 102 Wn. App. 795, 818–19, 10 P.3d 452, 465 (2000) ("[T]he collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable."). The police have probable cause to believe that a person's sample will provide evidence of criminal activity justifying the seizure if the facts and circumstances known to the officers justify their belief that

the person is intoxicated and has committed a crime of which intoxication is an element. *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558, 564 (1991) (en banc), *overruled on other grounds, State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *see also State v. Schulze*, 116 Wn.2d 154, 161, 804 P.2d 566, 570 (1991) (en banc) (no right to counsel prior to undergoing a mandatory blood draw); *State v. Komoto*, 40 Wn. App. 200, 208, 697 P.2d 1025, 1031 (1985) (police may enter home of suspected drunk driver if police "have probable cause to believe that the suspect was under the influence, that he has committed a felony of which being under the influence of alcohol is an element, and that he is presently at home.").

In Washington, mandatory blood testing has been found to not violate the Fourth Amendment or Article I, Section 7 in a variety of contexts. For example, the Washington Supreme Court has upheld mandatory blood tests of putative fathers, see *State v. Meacham*, 93 Wn.2d 735, 739, 612 P.2d 795, 798 (1980) (en banc), and mandatory HIV tests of convicted sexual offenders, see *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 93–94, 847 P.2d 455, 460 (1993). The court has further concluded that DNA testing of suspected sexual offenders presents only minimal Fourth Amendment intrusion. *State v. Kalakosky*, 121 Wn.2d 525, 535–36, 852 P.2d 1064, 1069–70 (1993) (en banc). In *State v. Olivas*, the court held that "a state interest in law enforcement will justify drawing blood from convicted persons without probable cause or individualized suspicion." 122 Wn.2d 73, 93, 856 P.2d 1076, 1086 (1993) (en banc). Similarly, in *Surge*, the court upheld a statute requiring mandatory DNA tests of convicted sexual offenders in order to establish a DNA databank. 122 Wn. App. at 456.

Although, in certain circumstances, drawing blood constitutes a seizure, a defendant may unknowingly consent. For example, implied consent to the administration of blood tests may be found in certain circumstances when a person drives an automobile. RCW 46.20.308; *see Baldwin*, 109 Wn. App. at 525 (upholding constitutionality of implied consent statute); *see also State v. Judge*, 100 Wn.2d 706, 712, 675 P.2d 219, 223 (1984) (en banc) (consent to blood testing is implied when a driver is arrested for negligent homicide or when unconscious while being arrested for driving while intoxicated).

1.3(g) Personal Effects and Papers

The Fourth Amendment expressly protects the right of privacy in "papers . . . and effects . . . ." U.S. Const. amend. IV. Although litigation concerning the search, seizure, and use of the content of private papers frequently centers on the Fifth Amendment bar against self-

incrimination, see, e.g., *Andresen v. Maryland*, 427 U.S. 463, 473, 96 S. Ct. 2737, 2745, 49 L. Ed. 2d 627, 638 (1976), the Fourth Amendment can act as an additional bar because of the protection accorded "papers" and "effects." LaFave and other commentators have argued that even when the seizure and use of private papers is consistent with the Fifth Amendment, the Fourth Amendment poses an absolute bar against the use of the highly private content of such papers. 1 Wayne R. LaFave, *Search and Seizure* § 2.6(e), at 707–15 (4th ed. 2004). *But see United States v. Miller*, 425 U.S. 435, 440–41, 96 S. Ct. 1619, 1623, 48 L. Ed. 71, 78 (1976) (no reasonable expectation of privacy in bank records, checks, deposit slips, and other records relating to bank accounts); *State v. Farmer*, 80 Wn. App. 795, 801, 911 P.2d 1030, 1033 (1996) (no right of privacy in bank account for a person who writes or passes bad checks); *Peters v. Sjoholm*, 95 Wn.2d 871, 876, 631 P.2d 937, 940 (1982) (en banc) (no need for search and seizure warrant where the seizing agency has probable cause to believe bank fund belongs to the relevant taxpayer); *Dep't of Revenue v. March*, 25 Wn. App. 314, 320, 610 P.2d 916, 920 (1979) (no expectation of privacy in tax records from legitimate inquiry by tax authorities). Also, a patient buying narcotic drugs from a pharmacy only has a limited expectation of privacy, and thus statutes allowing access to such records without warrants do not violate the constitution. *Murphy v. State*, 115 Wn. App. 297, 307–08, 62 P.3d 533, 538 (2003).

A reasonable expectation of privacy does not continue in personal effects if the individual's relinquishment of the effects occurred under circumstances indicating that the individual retained no reasonable expectation of privacy in the invaded place. *State v. Reynolds*, 144 Wn.2d 282, 287–88, 27 P.3d 200, 203 (2001) (en banc) (no expectation of privacy in contents of jacket that was abandoned during an arrest); *State v. Cheatam*, 112 Wn. App. 778, 784, 51 P.3d 138, 141 (2002) (no expectation of privacy to private property maintained in police evidence locker); *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577, 579 (2001) (officers may search voluntarily abandoned property); *State v. Putnam*, 61 Wn. App. 450, 456, 810 P.2d 977, 980 (1991), *modified and superseded on reconsideration*, 65 Wn. App. 606, 612, 829 P.2d 787, 790 (1992) (no legitimate expectation of privacy where property was owned by third party and the item had been abandoned); *State v. Toney*, 60 Wn. App. 804, 808, 810 P.2d 929, 930 (1991) (object discarded by suspect who is not in police custody is considered abandoned property and may be seized by police); *State v. Whitaker*, 58 Wn. App. 851, 853, 795 P.2d 182, 183 (1990) (police may retrieve voluntarily abandoned property unless abandonment was result of unlawful police conduct). While an

individual has an expectation of privacy in the contents of a zipped purse inadvertently left in a store, a police search for identification was justified after learning that the purse contained drugs. *State v. Kealey*, 80 Wn. App. 162, 173, 907 P.2d 319, 323 (1995).

The Washington Supreme Court rejected the holding in *California v. Greenwood*, 486 U.S. 35, 43, 108 S. Ct. 1625, 1630, 100 L. Ed. 2d 30, 38 (1988), and found a reasonable expectation of privacy in garbage left at curb for collection under Article I, Section 7 of the Washington Constitution. *State v. Boland*, 115 Wn.2d 571, 578, 800 P.2d 1112, 1116 (1990) (en banc). *But see State v. Hepton*, 113 Wn. App. 673, 679, 54 P.3d 233, 237 (2002) (no reasonable expectation of privacy in garbage bags left in front of neighboring abandoned house); *State v. Graffius*, 74 Wn. App. 23, 31, 871 P.2d 1115, 1120 (1994) (no privacy right in garbage can left partially open and exposing contraband to view); *State v. Rodriguez*, 65 Wn. App. 409, 418, 828 P.2d 636, 642 (1992) (no reasonable expectation of privacy in stolen goods hidden in a community garbage receptacle).

A reasonable expectation of privacy also exists in the contents of first-class mail and of sealed packages. *United States v. Jacobsen*, 466 U.S. 109, 114, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984); *State v. Jackson*, 82 Wn. App. 594, 603, 918 P.2d 945, 950 (1996) (seizure of mail occurs when a package is detained or removed from the normal flow of delivery; though temporary seizure is justified if authorities have a reasonable and articulable suspicion of criminal activity); *State v. Bishop*, 43 Wn. App. 17, 18, 714 P.2d 1199, 1199 (1986) (police did not violate Fourth Amendment by reopening packages already opened by security personnel). However, senders of mail have no reasonable expectation of privacy that would protect the surrounding area of a package from a canine sniff or that would protect their names and addresses on the exterior of a package. *State v. Stanphill*, 53 Wn. App. 623, 627, 769 P.2d 861, 863 (1989) (release of information at request of police regarding arrival of package did not unreasonably intrude into private affairs). Senders of parcels by common carriers have only a limited expectation of privacy; common carriers have the right to search parcels if they have reason to believe that they contain contraband. *State v. Gross*, 57 Wn. App. 549, 551, 789 P.2d 317, 319 (1990), *overruled on other grounds*, *State v. Thein*, 138 Wn.2d 133, 149, 977 P.2d 582, 589 (1999) (en banc); *see infra* § 5.31.

Placing a beeper inside an object does not, in and of itself, constitute a search. *United States v. Karo*, 468 U.S. 705, 712, 104 S. Ct. 3296, 3302, 82 L. Ed. 2d 530, 539–40 (1984); *State v. Young*, 123 Wn.2d 173, 182, 867 P.2d 593, 597 (1994) (en banc). However, monitoring the

beeper and thereby tracking the object may constitute a search of the location but not of the object. *Karo*, 468 U.S. at 713, 104 S. Ct. at 3302, 82 L. Ed. 2d at 540; *cf. United States v. Knotts*, 460 U.S. 276, 285, 103 S. Ct. 1081, 1087, 75 L. Ed. 2d 55, 64 (1983) (monitoring beeper in chloroform container invaded no reasonable expectation of privacy because monitoring occurred only while container was taken from store and transported in automobile on public highways and did not occur when container was moved into a residence); *see also supra* § 1.3(e).

1.3(h) Special Environments: Prisons, Schools, and Borders

Prisoners are not accorded the same expectations of privacy in their cells and effects as citizens generally enjoy in their homes and effects. *Matter of Personal Restraint of Benn*, 134 Wn.2d 868, 909, 952 P.2d 116, 137 (1998) (en banc) (convicted "prisoners have no legitimate expectation of privacy and . . . the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells . . . .") (quoting *Hudson v. Palmer*, 468 U.S. 517, 530, 104 S. Ct. 3194, 3202, 82 L. Ed. 2d 393, 405 (1984)). Routine searches of inmates' cells are reasonable because security interests of the institution outweigh the minimal intrusion into inmates' privacy. *State v. Rainford*, 86 Wn. App. 431, 438, 936 P.2d 1210, 1213 (1997) ("Washington courts have held that an inmate's expectation of privacy is necessarily lowered while in custody and that warrantless searches may be conducted if reasonable."); *State v. Brown*, 33 Wn. App. 843, 848, 658 P.2d 44, 47–48 (1983) (reasonableness of an inmate search must be determined by balancing the need for a particular search against the invasion of personal rights; the strip search of an inmate after a visit with his wife during which there was considerable contact was reasonable); *State v. Justice*, 29 Wn. App. 460, 460, 629 P.2d 454, 454 (1981) ("The reasonableness of a routine prison search, i.e., one conducted without probable cause or even a suspicion, must be determined by balancing the need for the particular search against the invasion of personal rights that the search entails.").

Probationers and parolees have a limited expectation of privacy, permitting a search if reasonable. *United States v. Knights*, 534 U.S. 112, 119–20, 122 S. Ct.. 587, 591–92, 151 L. Ed. 2d 497, 505 (2001); *State v. Fisher*, 145 Wn.2d 209, 226–27, 35 P.3d 366, 376 (2001) (en banc); *State v. Lucas*, 56 Wn. App. 236, 240, 783 P.2d 121, 124 (1989); *see also In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 92, 847 P.2d 455, 460 (1993) (en banc) (mandatory HIV testing of sexual offenders does not violate the right to privacy). *See infra* §§ 6.0, 6.2.

Customs officials may search persons and vehicles crossing the border into the United States under 19 U.S.C. § 1467 (1994). *See United*

States v. Flores-Montano, 541 U.S. 149, ___, 124 S. Ct. 1582, 1586, 158 L. Ed. 2d 311, 317 (2004) ("[A]utomobiles seeking entry into this country may be searched."); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 566, 96 S. Ct. 3074, 3087, 49 L. Ed. 2d 1116, 1133 ("[S]tops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant."). Nevertheless, the statute does not obviate the requirement that a particular search or seizure be reasonable within the meaning of the Fourth Amendment. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S. Ct. 2535, 2539, 37 L. Ed. 2d 596, 602 (1973) (although a statute authorizes customs searches without probable cause or mere suspicion, no Act of Congress can authorize a violation of the Constitution). Customs officers may not conduct warrantless searches based on less than probable cause at locations other than an actual border. *State v. Quick*, 59 Wn. App. 228, 233, 796 P.2d 764, 767 (1990). *See infra* §§ 6.0, 6.3.

The federal and state constitutional prohibition against unreasonable searches and seizures also applies to school officials acting under the authority of the state. *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 828–29, 122 S. Ct. 2559, 2564, 153 L. Ed. 2d 735, 743 (2002). However, students in schools enjoy only a limited expectation of privacy. *Id.* at 830–31, 122 S. Ct. at 2565, 153 L. Ed. 2d at 745; *see also York v. Wahkiakum School Dist. No. 200*, 110 Wn. App. 383, 385, 40 P.3d 1198, 1199 (2002) (schools may conduct searches of individual students if they have a reasonable suspicion); *State v. Slattery*, 56 Wn. App. 820, 822–23, 787 P.2d 932, 933 (1990) (warrantless search of high school student's car and locked briefcase fell within "school search" exception to warrant requirement when initial search of locker in response to a tip revealed $200 in small bills but no marijuana). *See infra* §§ 6.0–6.1.

1.4 DEFINING SEIZURES OF THE PERSON

A seizure occurs when an officer, by physical force or by show of authority, restrains an individual's freedom of movement. *Kaupp v. Texas*, 538 U.S. 626, 629, 123 S. Ct. 1843, 1844, 155 L. Ed. 2d 814, 821 (2003); *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). A person may be "seized" for purposes of the Fourth Amendment even when an arrest has not occurred. *See Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889, 903 (1968); *State v. Lyons*, 85 Wn. App. 268, 270–71, 932 P.2d 188, 189–90 (1997). However, not every encounter with a police officer amounts to a seizure. *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt*

County, ___ U.S. ___, ___, 124 S. Ct. 2451, 2458, 159 L. Ed. 2d 292, 302 (2004); *State v. Rankin*, 151 Wn.2d 689, 696–97, 92 P.3d 202, 205–06 (2004) (en banc); *State v. Mendez*, 137 Wn.2d 208, 222, 970 P.2d 722, 729 (1999) (en banc); *State v. Crespo Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096, 1097 (1985).

In order to determine whether a seizure has occurred, courts apply an objective test: "If a reasonable person would feel free to terminate the encounter, then he or she has not been seized." *United States v. Drayton*, 536 U.S. 194, 201, 122 S. Ct. 2105, 2110, 153 L. Ed. 2d 242, 251 (2002); *see also State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489, 495 (2003) (en banc) ("Under [A]rticle I, [S]ection 7, a person is seized only when, by means of physical force or a show of authority his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter.") (internal quotation marks and citations omitted). For examples of cases in which the objective test was not satisfied, see *Drayton*, 536 U.S. at 194, 122 S. Ct. at 2105, 153 L. Ed. 2d at 251 (finding no seizure when plain-clothed police boarded bus, showed badges, and started asking passengers questions); *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 572 (1988) (finding no seizure when police caught up with and drove alongside a fleeing individual for a short distance without any show of authority or command to stop); *O'Neill*, 148 Wn.2d at 577, 62 P.3d at 496–97 (2003) (officer does not necessarily commit seizure by questioning suspects and asking for identification); *State v. Cerrillo*, 122 Wn. App. 341, 350, 93 P.3d 960, 964 (2004) (finding no seizure when officer knocked on window of parked car and asked for identification).

Accordingly, an officer's request for identification or other information relating to one's identity is unlikely to be viewed as an unlawful seizure unless additional circumstances are present. *Hiibel*, ___ U.S. at ___, 124 S. Ct. at 2458, 159 L. Ed. 2d at 302 (holding that "interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure") (quoting *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 1762, 80 L. Ed. 2d 247, 255 (1984)); *State v. Hansen*, 99 Wn. App. 575, 578, 994 P.2d 855, 856 (2000) (holding that "police questioning relating to one's identity, or a request for identification by the police, without more, is unlikely to result in a seizure"); *Crespo Aranguren*, 42 Wn. App. at 456, 711 P.2d at 1098 (finding that police acted properly in stopping defendants and using "permissive" language to ask if they had come from the area of the reported vandalism).

However, under Article I, Section 7, "a mere request for identification from a passenger for investigatory purposes constitutes a seizure unless there is a reasonable basis for the inquiry." *Rankin*, 151 Wn.2d at 697. In *Rankin*, a passenger in a vehicle that was stopped for a traffic infraction was asked for identification by the investigating officer. *Id.* at 691. The Washington Supreme Court held that a passenger's right of privacy is violated "when an officer requests identification from a passenger for investigative purposes, absent an independent basis for making the request." *Id.* at 692; *see generally* 2 Wayne R. LaFave, *Search and Seizure* § 5.1(a), at 5–15 (4th ed. 2004). For a discussion of the level of proof needed to make seizures of the person, see *infra* §§ 2.1 (arrest) and 2.9(b) (*Terry* stop).

1.4(a) Consensual Encounters

A consensual encounter with an officer does not trigger the Fourth Amendment, even when the individual has been approached by an officer and is aware of the officer's identity as an officer. *United States v. Drayton*, 536 U.S. 194, 200–01, 122 S. Ct. 2105, 2110, 153 L. Ed. 2d 242, 251 (2002) (citing *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983)); *see also State v. Belanger*, 36 Wn. App. 818, 820, 677 P.2d 781, 783 (1984). Factors reviewed by the court in determining whether the scope of a *Terry* stop, *infra* 2.9(b), has been exceeded and whether an arrest has occurred are the following:

> [T]he officer's training and experience, the location of the stop, and the conduct of the person detained. Other factors that may be considered in determining whether a stop was reasonable include "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained."

State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594, 598–99 (2003) (en banc) (quoting *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065, 1069 (1984) (en banc)).

The degree of intrusion must also be appropriate with regard to the type of crime under investigation and the probable dangerousness of the suspect. *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt County*, ___ U.S.___, ___, 124 S. Ct. 2451, 2458, 159 L. Ed. 2d 292, 302 (2004) ("To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.") (internal quotation marks omitted); *State v. Wheeler*, 108 Wn.2d 230, 235, 737 P.2d 1005, 1007 (1987) (en banc).

The "free to go" standard has not been abandoned under federal law. *Michigan v. Chesternut*, 486 U.S. 567, 573–74, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 572 (1988). *But see Florida v. Bostick*, 501 U.S. 429, 435–36, 111 S. Ct. 2382, 2387, 115 L. Ed. 2d 389, 399 (1991) ("When police attempt to question a person who is walking down the street or through an airport lobby, it makes sense to inquire whether a reasonable person would feel free to continue walking. But when the person is seated on a bus and has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter."). The United States Supreme Court has held that questioning by law enforcement officers remains consensual until a reasonable person would believe that he or she could not leave the presence of the officers or until he or she refuses to respond to their inquiries and the police take further action. *I.N.S. v. Delgado*, 466 U.S. 210, 216, 104 S. Ct. 1758, 1763, 80 L. Ed. 2d 247, 255 (1984) (finding no seizure of the workplace or of the individual workers when INS agents moved systematically through the factory inquiring about the workers' citizenship while other INS agents were stationed at the exits). *See generally infra* § 5.10 (discussing what constitutes consent).

Police action does not exceed the proper purpose and scope of a *Terry* stop (*see supra* § 1.4(a) and *infra* § 2.9(b)) when the purpose of the stop is directly related to detaining and investigating the defendant in connection with a robbery. *State v. Thornton*, 41 Wn. App. 506, 512, 705 P.2d 271, 275 (1985). While an unfounded hunch is insufficient to justify a stop, the police may reasonably act on an individualized hunch or on circumstances that appear incriminating to the officer based on his or her past experience. *State v. Samsel*, 39 Wn. App. 564, 570–71, 694 P.2d 670, 675 (1985). Traffic stops that are pretext for conducting a criminal investigation violate Article I, Section 7 of the Washington Constitution. *State v. Ladson*, 138 Wn.2d 343, 352–53, 979 P.2d 833, 839 (1999) (en banc). A court should consider "both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior" to determine whether a stop was pretextual. *Id.* at 359. *See generally infra* § 4.7(a). For post-*Terry* analysis, see 4 LaFave, *supra*, § 8.1(c), at 19–50.

1.4(b) Seizures in Vehicles

A seizure of an automobile driver occurs as soon as an officer in a police car switches on the flashing light. *State v. DeArman*, 54 Wn. App. 621, 624, 774 P.2d 1247, 1248 (1989); *State v. Owens*, 39 Wn. App. 130, 132, 692 P.2d 850, 851 (1984). However, a seizure of the passenger in a pulled-over vehicle does not occur until the officer takes further action

(e.g., demanding that the passenger stay in or return to the car, or asking for identification). *State v. Mendez*, 137 Wn.2d 208, 222, 970 P.2d 722, 729 (1999) (en banc); *State v. Rehn*, 117 Wn. App. 142, 149, 69 P.3d 379, 381 (2003) ("Apparently, barring exceptional circumstances, a passenger is free to walk away from or stay at the traffic stop scene.").

Under both Article I, Section 7 and the Fourth Amendment, a seizure also occurs when an officer stops automobiles pursuant to a systematic "spot check" for drivers' licenses or vehicle registration, or for "sobriety checks." *City of Indianapolis v. Edmond*, 531 U.S. 32, 41, 121 S. Ct. 447, 454, 148 L. Ed. 2d 333, 343 (2000); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 449–50, 110 S. Ct. 2481, 2485, 110 L. Ed. 2d 412 (1990); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555–56, 96 S. Ct. 3074, 3082, 49 L. Ed. 2d 1116 (1976); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 457–60, 755 P.2d 775, 777 (1988) (en banc); *State v. Marchand*, 104 Wn.2d 434, 437, 706 P.2d 225, 226 (1985) (en banc). However, a police roadblock is only unconstitutional if the seizure is unreasonable. *State v. Williams*, 85 Wn. App. 271, 278, 932 P.2d 665, 668 (1997). To determine the reasonableness of spot checks or vehicle checkpoints, the court will weigh the government's interest in the checkpoints, the extent to which the program advances the government's goals, and the amount of intrusion to the individual motorist. *Illinois v. Lidster*, 540 U.S. 419, 426, 124 S. Ct. 885, 890, 157 L. Ed. 2d 843, 852 (2004); *Williams*, 85 Wn. App. at 278–79. In *Mesiani*, during the winter holiday season, the City of Seattle instituted sobriety checkpoints, in which officers stopped drivers without individualized suspicion or probable cause. 110 Wn.2d at 455. While noting that there is a "very strong societal interest in dealing effectively with the problem of drunken driving," the *Mesiani* court found that the checkpoints violated Article I, Section 7 and the Fourth Amendment because the City "failed to demonstrate the need for sobriety checkpoints or that less intrusive alternatives could not achieve most of the constitutionally permissible benefits sought, such as the addition of more officers to its special enforcement unit." *Id.* at 459. *See generally* 5 LaFave, *supra*, § 10.8(a), at 333–51; *see also supra* § 1.3(e) and *infra* § 5.21.

1.4(c) Seizures in Homes

The Fourth Amendment is triggered even though a person is detained in his or her own home. *Michigan v. Summers*, 452 U.S. 692, 696, 101 S. Ct. 2587, 2590–91, 69 L. Ed. 2d 340, 345 (1981); *State v. Holeman*, 103 Wn.2d 426, 428, 693 P.2d 89, 90 (1985) (en banc); *see also supra* § 1.3(a). However, "even without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing a

search warrant at a residence to briefly detain occupants of that residence, to insure officer safety and an orderly completion of the search." *State v. King*, 89 Wn. App. 612, 618–19, 949 P.2d 856, 860 (1998).

1.4(d) Civil Offenses

The Fourth Amendment is also triggered by a seizure of the person even though the seizure pertains to civil, and not criminal, offenses. *See State v. Klinker*, 85 Wn.2d 509, 514–15, 537 P.2d 268, 274 (1975) (en banc). However, a seizure cannot occur without some governmental participation. *State v. Jackson*, 82 Wn. App. 594, 603, 918 P.2d 945, 950 (1996); *see also State v. Krajeski*, 104 Wn. App. 377, 382, 16 P.3d 69, 72 (2001) ("Generally, the Fourth Amendment does not protect against unreasonable intrusions by private individuals.").

1.5 DEFINING SEIZURES OF PROPERTY

The Fourth Amendment protects a person's possessory interest in effects as well as his or her privacy interest. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644, 77 L. Ed. 2d 110, 120 (1983). "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656, 80 L. Ed. 2d 85, 94 (1984); *State v. Jackson*, 82 Wn. App. 594, 603, 918 P.2d 945, 950 (1996). Put differently, an object is seized for purposes of the Fourth Amendment when government agents exercise "dominion and control" over the object. *Jacobsen*, 466 U.S. at 120, 104 S. Ct. at 1660, 80 L. Ed. 2d at 99; *Jackson*, 82 Wn. App. at 603–04. Thus, impounding a room or securing a home constitutes a seizure under the Fourth Amendment. *State v. Ng,* 104 Wn.2d 763, 770, 713 P.2d 63, 67 (1985) (en banc) (citing *State v. Bean*, 89 Wn.2d 467, 472, 572 P.2d 1102, 1104–05 (1978)).

In some circumstances, interference with an individual's possessory interests may also implicate an individual's liberty interests. For example, in *Place*, the seizure of luggage at an airport was determined to "effectively restrain the person since he is subjected to the possible disruption of his travel plans in order to remain with his luggage or to arrange for its return." 462 U.S. at 708, 103 S. Ct. at 2645, 77 L. Ed. 2d at 122; *see also* 4 Wayne R. LaFave, *Search and Seizure* § 9.6, at 614–97 (4th ed. 2004).

1.6 STANDING TO RAISE SEARCH AND SEIZURE CLAIMS

Traditionally, a criminal defendant alleging infringement of Fourth Amendment rights first had to show "standing" to raise the claim. The

defendant's burden was to demonstrate that the interest in the outcome of the controversy stemmed from a violation of his or her rights rather than from the violation of the rights of some third party. 6 Wayne R. LaFave, *Search and Seizure* § 11.3, at 126–254 (4th ed. 2004).

The "automatic standing" exception to this rule was created for the defendant who is charged with an offense involving possession of property as an element when the defendant challenges the search or seizure of the property. *Jones v. United States*, 362 U.S. 257, 263–64, 80 S. Ct. 725, 732, 4 L. Ed. 2d 697, 704 (1960); *State v. Michaels*, 60 Wn.2d 638, 646, 374 P.2d 989, 993–94 (1962) (en banc) (adopting the "automatic standing" exception for Washington).

In 1978, the United States Supreme Court merged the concept of standing with the substantive law of Fourth Amendment privacy analysis. *Rakas v. Illinois*, 439 U.S. 128, 138–40, 99 S. Ct. 421, 427–29, 58 L. Ed. 2d 387, 397–99 (1978). Accordingly, the federal courts have abandoned the standing analysis in the Fourth Amendment context. *Minnesota v. Carter*, 525 U.S. 83, 87–88, 119 S. Ct. 469, 472, 142 L. Ed. 2d 373, 378 (1998) ("[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'") (quoting *Rakas*, 439 U.S. at 143 n.12, 99 S. Ct. at 430 n.12, 58 L. Ed. 2d at 402 n.12).

In contrast, Washington courts have continued to apply standing analysis to challenges brought under Article I, Section 7. *See, e.g., State v. Reynolds*, 144 Wn.2d 282, 286, 27 P.3d 200, 202 (2001) (en banc) (affirming Court of Appeals ruling that defendant lacked "standing" to challenge arrest of third person); *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714, 717–18 (2000) (en banc) (holding that defendant lacked "standing" to challenge police entry of third party's home). *But see State v. Francisco*, 107 Wn. App. 247, 252, 26 P.3d 1008, 1011 (2001) ("'[T]he better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment' rather than on any theoretically separate, but invariably intertwined, concept of standing.") (quoting *Rakas*, 439 U.S. at 139, 99 S. Ct. at 428, 58 L. Ed. 2d at 398).

As the *Rakas* concept of "personal" privacy interest developed, the Supreme Court indicated some types of situations in which a defendant does or does not have such an interest. Generally, an individual "who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to ex-

clude." *Rakas*, 439 U.S. at 143 n.12, 99 S. Ct. at 430 n.12, 58 L. Ed. 2d at 402 n.12; *see also State v. Mathe*, 102 Wn.2d 537, 544, 688 P.2d 859, 863 (1984) (en banc) ("The landlord-tenant relationship will not support an inference that a search is authorized, when the tenant is in exclusive possession of the property."). Nevertheless, although "property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of [the] inquiry." *United States v. Salvucci*, 448 U.S. 83, 91–92, 100 S. Ct. 2547, 2553, 65 L. Ed. 2d 619, 628 (1980) (citation omitted). Accordingly, an "illegal search only violates the rights of those who have 'a legitimate expectation of privacy in the invaded place.'" *Id.* (quoting *Rakas*, 439 U.S. at 143, 99 S. Ct. at 430, 58 L. Ed. 2d at 401) (holding that unlawful possession of stolen goods stored in the apartment of another does not confer on thieves a reasonable expectation of privacy as to the interior of apartment). A person who resides in an apartment with the permission of the lessee and who has a key to the apartment may assert a privacy interest in the interior of the apartment. *Rakas*, 439 U.S. at 141–42, 99 S. Ct. at 429–30, 58 L. Ed. 2d at 399–400 (citing *Jones v. United States*, 362 U.S. 257, 267, 80 S. Ct. 725, 734, 4 L. Ed. 2d 697 (1960)).

A mere passenger in a motor vehicle may not assert a personal privacy interest in the interior of the vehicle, but may challenge his or her own seizure. *Rakas*, 439 U.S. at 148–50, 99 S. Ct. at 433–34, 58 L. Ed. 2d at 404–05; *State v. Byrd*, 110 Wn. App. 259, 264, 39 P.3d 1010, 1013 (2002) ("[A] passenger in a vehicle stopped by police officers can contest the lawfulness of the stop."); *State v. Takesgun*, 89 Wn. App. 608, 611, 949 P.2d 845, 846–47 (1998). In contrast, a person who is driving the vehicle with the owner's permission *may* assert a privacy interest in the interior of the vehicle. *United States v. Lopez*, 474 F. Supp. 943, 946 (C.D. Cal. 1979). An employee who maintains a separate office secured by a locked door may assert a privacy interest in that office for public employees. *Ortega v. O'Connor*, 764 F.2d 703, 705–06 (9th Cir. 1985), *rev'd on other grounds*, 480 U.S. 709, 736, 107 S. Ct. 1492, 1507, 94 L. Ed. 2d 714, 735 (1987). In *Ortega*, the Ninth Circuit Court of Appeals held that the defendant had a reasonable expectation of privacy in his or her office. 764 F.2d at 706. To distinguish other decisions in which it had found no expectation of privacy in the workplace, the court emphasized that this employer had implemented no general inspection policy that would have allowed other employees to access the office in question. *Id.* On appeal, the Supreme Court upheld the Ninth Circuit's privacy analysis, but applied a reasonableness standard rather than a probable cause

standard for public employees. *Ortega,* 480 U.S. at 719–21, 107 S. Ct. at 1498–99, 94 L. Ed. 2d at 724–26.

By merging the standing issue with a privacy analysis, the federal courts abandoned the concept of automatic standing. *Salvucci*, 448 U.S. at 92–93, 100 S. Ct. at 2553, 65 L. Ed. 2d at 629. Hence, although the Fourth Amendment no longer governs searches of stolen goods, it does apply to searches of legally possessed items discovered in the search of stolen goods. Defendants who claimed that a stolen footlocker belonged to their brother established a possessory interest as bailees sufficient to have standing under *Rakas*. *State v. Grundy*, 25 Wn. App. 411, 415, 607 P.2d 1235, 1237 (1980) (discussing *Rakas*). But a defendant may not claim an expectation of privacy in the interior of an acquaintance's purse into which he has placed his belongings. *Rawlings v. Kentucky*, 448 U.S. 98, 106, 100 S. Ct. 2556, 2562, 65 L. Ed. 2d 633, 642 (1980).

Unlike the Fourth Amendment, Article I, Section 7 of the Washington Constitution invests automatic standing upon anyone charged with a possessory crime. *See State v. Simpson*, 95 Wn.2d 170, 179, 622 P.2d 1199, 1206 (1980) (en banc) (plurality opinion) (upholding the use of automatic standing based on the state constitution); *see also State v. Chelly*, 94 Wn. App. 254, 258, 970 P.2d 376, 378 (1999) ("[U]nder the state constitution, a defendant who has been charged with an offense that has possession as an element has automatic standing to challenge the search that led to the discovery of the substance the defendant is charged with possessing."); *State v. Johnston*, 38 Wn. App. 793, 793–94, 690 P.2d 591, 594 (1984). *But see State v. Coss*, 87 Wn. App. 891, 895–98, 943 P.2d 1126, 1127–29 (1997) (recognizing lack of binding authority for automatic standing in Washington due to plurality opinion of *Simpson*); *State v. Carter*, 127 Wn.2d 836, 850–51, 904 P.2d 290, 296–97 (1995) (en banc) (affirming, but taking issue with Division One's abandonment of automatic standing doctrine); *State v. Zakel*, 119 Wn.2d 563, 569–71, 834 P.2d 1046, 1049–50 (1992) (en banc) (affirming the decision of Division Two, but refusing to decide whether the state constitution requires the automatic standing doctrine because the facts presented did not properly raise the issue).

Although Washington's "automatic standing" doctrine has been criticized by some courts, it explicitly remains valid under the state constitution through *Simpson*'s plurality opinion. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062, 1064 (2002) (en banc) (citing *Simpson*, 95 Wn.2d at 179); *see also Carter*, 127 Wn.2d at 850–51; *Zakel*, 119 Wn.2d at 569–71; *Coss*, 87 Wn. App. at 895–98. In fact, the Washington Supreme Court has gone beyond *Rakas* on the basis of state statute. In *State v. Williams*, 94 Wn.2d 531, 544, 617 P.2d 1012, 1020 (1980), a defen-

dant was accorded standing to challenge the use of a codefendant's conversation that had been recorded in violation of the Washington Privacy Act. RCW 9.73.030; *cf. Alderman v. United States*, 394 U.S. 165, 175, 89 S. Ct. 961, 966–68, 22 L. Ed. 2d 176, 187–88 (1969).

However, in order to invoke the automatic standing exception to the general standing requirements in Washington, two requirements must be met: (1) Possession must be an "essential" element of the offense for which the defendant is charged and (2) the defendant must be in possession of the seized property at the time of the contested search. *Jones*, 146 Wn.2d at 332 (citing *Simpson*, 95 Wn.2d at 181).

Finally, the State may not raise the issue of lack of standing for the first time on its appeal of a suppression order. *Grundy*, 25 Wn. App. at 415 (distinguishing *Combs v. United States*, 408 U.S. 224, 227, 92 S. Ct. 2284, 2286, 33 L. Ed. 2d 308, 311 (1972), where standing was raised on appeal by the government as respondent); *see also Coss*, 87 Wn. App. at 895–98 (recognizing that the State, as respondent, may raise standing issue on appeal for the first time).

CHAPTER 2: STANDARDS OF PROOF

2.0 NATURE OF PROBABLE CAUSE: INTRODUCTION

This chapter summarizes the standards for probable cause for searches and seizures conducted with or without a warrant. Sections 2.1 and 2.2 discuss the nature of the standard; sections 2.3 through 2.8 discuss specific types of information considered in the probable cause determination. The final section, 2.9, summarizes the types of searches and seizures for which probable cause is either not required or a lesser standard is applied.

The Fourth Amendment of the United States Constitution provides that "no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Probable cause requires reasonable grounds to believe that a defendant is guilty of a crime. *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769, 775 (2003). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.2 (4th ed. 2004) (discussing the general nature of probable cause). The belief must be particularized with regard to the person to be searched or seized. *Id.* The probable cause requirement is a fact-based determination that represents a compromise between the competing interests of enforcing the law and protecting the individual's right to privacy. *See generally Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879, 1890–91 (1949) (probable cause must be based on more than mere suspicion). Police officers must have probable cause even for searches and seizures in which no warrant is required. *See Wong Sun v. United States*, 371 U.S. 471, 479–80, 83 S. Ct. 407, 413, 9 L. Ed. 2d 441, 450–51 (1963). In the case of a valid search or seizure without a warrant, police may make the initial determination of whether probable cause exists. *See id.* The grounds for the search or seizure, however, must be strong enough to obtain a warrant. *Id.* For a warrant to be issued, a neutral and detached magistrate must make the probable cause determination. *Johnson v. United States*, 333 U.S. 10, 14, 68 S. Ct. 367, 369, 92 L. Ed. 436, 440 (1948). In addition, a suspect arrested without a warrant may not be detained for an extended period of time without a judicial determination of probable cause. *Gerstein v. Pugh*, 420 U.S. 103, 124–25, 95 S. Ct. 854, 868–69, 43 L. Ed. 2d 54, 71–72 (1975). *See generally* 2 LaFave, *supra*, § 3.1, at 20–24.

Similarly, Article I, Section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Washington Supreme Court has held that this provision provides more protection than the Fourth Amendment. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202,

204 (2004) (en banc). Accordingly, when an informant's tip is the basis of probable cause, Washington courts have rejected the federal totality of circumstances test in favor of the *Aguilar-Spinelli* test, which requires a showing of both the informant's basis of knowledge and his reliability. *State v. Vickers*, 148 Wn.2d 91, 111–12, 59 P.3d 58, 68–69 (2002) (en banc); *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136, 143 (1984); *State v. Cole*, 128 Wn.2d 262, 287, 906 P.2d 925, 940 (1995) (en banc) (different rules apply depending on whether the confidential informant is a professional informant or a private citizen); *State v. Murray*, 110 Wn.2d 706, 711–12, 757 P.2d 487, 489–90 (1988) (en banc) (veracity of informant established from evidence obtained through independent investigation that supported the substance of the informant's claims); *State v. Huft*, 106 Wn.2d 206, 209–10, 720 P.2d 838, 840 (1986) (en banc) (independent investigation of only innocuous details is insufficient to corroborate information under either prong). *See generally infra* at § 2.5 (discussing the applicability of *Aguilar-Spinelli* test to informants).

Federal officers working with state officials must comply with the Washington Constitution. *State v. Johnson*, 75 Wn. App. 692, 700, 879 P.2d 984, 989 (1994) (aerial photography by state officers working in concert with a federal drug operation required federal officers' compliance with state constitution); *cf. State v. Brown*, 132 Wn.2d 529, 591, 940 P.2d 546, 579 (1997) (en banc) (evidence "independently and lawfully obtained by federal officers acting pursuant to federal law may be transferred to state authorities for use in a Washington State criminal proceeding.") (quoting *In re Teddington*, 116 Wn.2d 761, 772–73, 808 P.2d 156, 161 (1991) (en banc)).

However, where a federal warrant is served, the federal standard for probable cause applies even though the evidence will be used in state courts. *See Johnson*, 75 Wn. App. at 699. And evidence obtained by federal officers under federal law is admissible in Washington even if its seizure might have violated the Washington Constitution. *Teddington*, 116 Wn.2d at 772; *see also State v. Bradley*, 105 Wn.2d 898, 902–03, 719 P.2d 546, 548–49 (1986) (en banc) (holding that a border search by federal officers "is equivalent to a search conducted in a different jurisdiction" and that neither Washington law nor the Washington Constitution can control federal officers' conduct).

The validity of a search warrant is reviewed for abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199, 1204 (2004) (en banc); *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217, 225 (2003) (en banc). Both an officer's decision and a magistrate's warrant authorization are subject to judicial review, but the magistrate's determination is given great deference by a reviewing court. *Maddox*, 152 Wn.2d at 509;

Jackson, 150 Wn.2d at 265. The affidavit giving rise to the warrant is evaluated in a common sense manner and not hypertechnically. *Jackson*, 150 Wn.2d at 265; *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115, 116 (1975) (en banc). All doubts are resolved in favor of the warrant's validity. *Maddox*, 152 Wn.2d at 509; *Jackson*, 150 Wn.2d at 265. A magistrate is entitled to draw commonsense and reasonable inferences from the information set forth in the affidavit. *Maddox,* 152 Wn.2d at 509; *In re Yim*, 139 Wn.2d 581, 596, 989 P.2d 512, 520 (1999) (en banc) (citing *Helmka*, 86 Wn.2d at 93).

The probable cause requirement may be satisfied even when police officers make a reasonable mistake of fact. *State v. Vickers*, 148 Wn.2d at 114–15, 117 (2002) (en banc) (officer included incorrect date of informant's observations in affidavit); *In re Yim*, 139 Wn.2d at 597 (failure to assert in affidavit that defendant lacked a license to sell explosive devices was not critical when magistrate could reasonably infer that defendant was probably engaged in the unlicensed manufacture and sale of explosive devices); *State v. Seagull*, 95 Wn.2d 898, 900, 908, 632 P.2d 44, 46, 50 (1981) (en banc) (warrant valid even though officer misidentified tomato plant as marijuana).

However, if the defendant makes a substantial preliminary showing of "intentional material omissions or material omissions made with reckless disregard for the truth, and establishes the allegations at a hearing by a preponderance of the evidence," then the omitted material must be considered in making a finding on probable cause. *State v. Gore*, 143 Wn.2d 288, 297, 21 P.3d 262, 268 (2001) (en banc); *cf. State v. Garrison*, 118 Wn.2d 870, 872–73, 827 P.2d 1388, 1390 (1992) (en banc) (per curiam) (mere showing of the omission of material that is critical to a finding of probable cause is not a sufficient preliminary showing that the omission was a reckless disregard for the truth). *See generally Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978).

Allegations of a negligent or innocent mistake are not sufficient to void a warrant. *Gore*, 143 Wn.2d at 296; *Yim*, 139 Wn.2d at 597. But when police make an "inexcusable mistake of law" and incorrectly believe that certain conduct is unlawful, a search or seizure based on that belief is invalid. *State v. Melrose*, 2 Wn. App. 824, 828, 470 P.2d 552, 555–56 (1970). A search or seizure is also unlawful if it is based solely on a law subsequently held unconstitutional. *State v. Swaite*, 33 Wn. App. 477, 483, 656 P.2d 520, 524–25 (1982) (law subsequently held void for vagueness). *See generally State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668, 680 (2000) (en banc) (evidence discovered as a result of an unconstitutional search or seizure must be suppressed).

2.1 PROBABLE CAUSE STANDARD: ARREST VERSUS SEARCH

Probable cause to arrest requires the same sufficiency of evidence as probable cause to search. *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.2(d) (4th ed. 2004) (discussing the general nature of probable cause). *But see State v. Fisher*, 104 Wn. App. 772, 780, 17 P.3d 1200, 1205 (2001) (Wash. CrR 3.2(l)(1) requires only a well-founded suspicion that a probation violation has occurred in order to issue a bench warrant for an admitted felon who is awaiting sentencing). However, probable cause for a search does not always constitute probable cause for arrest, and probable cause for arrest does not necessarily justify a search.

For a search, the officer must have probable cause to believe that the items to be seized are connected with criminal activity and will be found in the place to be searched. *State v. Thein*, 138 Wn.2d 133, 147, 151, 977 P.2d 582, 588, 590 (1999) (en banc) (requiring a nexus between criminal activity and the item seized and a nexus between the item seized and the place searched); *State v. Jackson*, 111 Wn. App. 660, 688, 46 P.3d 257, 272 (2002) (dictum) (rejecting generalization that criminals commonly return to the scene of their crime); *State v. Nordlund*, 113 Wn. App. 171, 182–84, 53 P.3d 520, 525–26 (2002) (affidavit's generalized statements about the computer habits of sex offenders insufficient to justify search of the defendant's personal computer; no factual nexus between alleged crimes and information from computer that could show the defendant's presence at home); *State v. McReynolds*, 104 Wn. App. 560, 570, 17 P.3d 608, 615 (2001) (inscribed crow bar alone provided insufficient nexus between alleged crimes and the defendant's residence). When a search implicates First Amendment concerns, the court must closely scrutinize the probable cause requirement. *Nordlund*, 113 Wn. App. at 181–82 (search and seizure of a personal computer required "scrupulous scrutiny" of the affidavit for probable cause).

To justify an arrest, the officer must have probable cause to believe that an offense has been or is being committed and that the person to be arrested committed the offense. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872, 875 (2004) (en banc); *State v. Cerrillo*, 122 Wn. App. 341, 350–51, 93 P.3d 960, 964–65 (2004). In addition, searches and seizures must be supported by probable cause whether or not an arrest is made. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160, 163 (1994) (en banc).

Probable cause to arrest exists when the arresting officer has information which would lead a person of reasonable caution to conclude that the suspect has committed a crime. *State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227, 233–34 (1996) (en banc). Probable cause to arrest is a nontechnical standard and exists based on the facts and circumstances

known to the officer at the time. *State v. Gaddy*, 152 Wn.2d at 70; *Graham*, 130 Wn.2d at 724; *State v. Baxter*, 68 Wn.2d 416, 420, 413 P.2d 638, 641 (1966); *State v. Lewellyn*, 78 Wn. App. 788, 797–98, 895 P.2d 418, 423 (1995), *aff'd*, 130 Wn.2d 215, 922 P.2d 811 (1996) (suspect's two prior DUI arrests supported by officer's observations, defendants' driving, and field sobriety tests); *State v. Garcia*, 63 Wn. App. 868, 870–75, 824 P.2d 1220, 1221–24 (1992) (hotel maid's observations of folded papers in a drawer, diesel fuel smell, and telephone calls at all hours were not sufficient by themselves, but, when combined with the police information of the suspect's car on a drug trafficking tip sheet, did constitute sufficient probable cause); *State v. Griffith*, 61 Wn. App. 35, 39, 808 P.2d 1171, 1173 (1991) (police had probable cause to arrest the defendant on a DWI charge when the defendant drove erratically, hit a roadway construction sign, did not stop in response to police emergency flashers, and proceeded to a home); *State v. Fore*, 56 Wn. App. 339, 343–44, 783 P.2d 626, 629 (1989) (probable cause existed based on officer's observation of drug transactions in area with reported narcotics activity and performed in a manner similar to undercover buys made by the officer). However, probable cause cannot be supported by information obtained by the police after an arrest. *State v. Mance*, 82 Wn. App. 539, 541–42, 918 P.2d 527, 529 (1996).

The facts and circumstances known to the officer must also be reasonably trustworthy information. *Gaddy*, 152 Wn.2d at 70; *State v. Reeb*, 63 Wn. App. 678, 681–82, 821 P.2d 84, 86 (1992) (information need only be reasonably trustworthy, not absolutely accurate); *State v. Smith*, 102 Wn.2d 449, 455, 688 P.2d 146, 150 (1984) (en banc) (applying *Aguilar-Spinelli* test to officer's reliance on "'street kids' whose reliability the officers themselves apparently questioned").

2.2 PROBABLE CAUSE STANDARD: CHARACTERISTICS

2.2(a) Objective Test

Under both the federal and state constitutions, the probable cause standard is an objective one. *Beck v. Ohio*, 379 U.S. 89, 96, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142, 147 (1964); *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872, 875 (2004) (en banc). The officer's subjective belief is not determinative. *State v. Huff*, 64 Wn. App. 641, 645, 826 P.2d 698, 701 (1992). Accordingly, an officer's good faith is not enough to justify a search absent probable cause, and an officer's belief that probable cause was not present is also not determinative. *State v. Gaddy*, 114 Wn. App. 702, 706, 60 P.3d 116, 119 (2002), *aff'd on other grounds by*, 152 Wn.2d 64, 93 P.3d 872 (2004) (officer's good faith reliance on an agency

"hot sheet" would not validate an arrest if the "hot sheet" was not based upon probable cause); *State v. Rodriguez-Torres*, 77 Wn. App. 687, 693, 893 P.2d 650, 653 (1995) (officer's subjective belief that probable cause did not exist was not dispositive); *Huff*, 64 Wn. App. at 645–46 (officer's subjective belief that an offense has been committed does not cure lack of probable cause).

The probable cause standard is determined with reference to a reasonable person with the expertise and experience of the officer in question. *See United States v. Ortiz*, 422 U.S. 891, 897–98, 95 S. Ct. 2585, 2591, 45 L. Ed. 2d 623, 629 (1975) (border patrol officers are entitled to draw inferences in light of their prior experience with aliens and smugglers); *State v. Seagull*, 95 Wn.2d 898, 906–07, 632 P.2d 44, 49 (1981) (en banc) (magistrate could consider officer's experience in observing marijuana in plant and crushed leaf form over an eight-year period). As a result, an officer's particular training and expertise is highly important. *State v. Cole*, 128 Wn.2d 262, 289, 906 P.2d 925, 941 (1995) (en banc) (acknowledging officer's drug enforcement experience and ability to identify marijuana smell); *State v. Rodriguez-Torres*, 77 Wn. App. at 693–94 (sufficient evidence to support probable cause when an officer with specialized training in narcotics enforcement observed exchange of money for hidden, cupped object in an area known for narcotics and defendant fled upon notice of officer's presence). The information regarding the basis of knowledge and an officer's specific training and experience must be included in the affidavit so that the magistrate may make an independent determination of probable cause and establish more than the officer's personal belief. *State v. Jacobs*, 121 Wn. App. 669, 678, 89 P.3d 232, 238 (2004) (noting that an affidavit's failure to indicate an officer's experience and education is not fatal to the resulting warrant's validity if other facts establish probable cause); *State v. Johnson*, 79 Wn. App. 776, 780, 904 P.2d 1188, 1189–90 (1995).

The affidavit establishing probable cause for a search warrant must set forth sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity and that the evidence of the crime may be found in the place to be searched. *Jacobs*, 121 Wn. App. at 676 (probable cause established by reliable informant and police detection of noxious odors); *State v. Jackson*, 150 Wn.2d 251, 264–65, 76 P.3d 217, 224–25 (2003) (en banc) (use of GPS device justified when the defendant was alone with child the morning of the crime, bloodstains and pubic hair were found on child's pillow and sheets, and use of car was likely as defendant had limited time to visit the victim or the victim's body); *State v. Goble*, 88 Wn. App. 503, 512–13, 945 P.2d 263, 268 (1997) (magistrate did not have probable cause to be-

lieve methamphetamine contraband would be found at a house to be searched since the informant provided only that the drugs came to the suspect's post office box); *Cole*, 128 Wn.2d at 287–89 (reliable informant and police observation of marijuana smell established probable cause).

Although a single fact in isolation may not be sufficient, probable cause may exist when that fact is read together with other facts stated in the affidavit. *State v. Vickers*, 148 Wn.2d 91, 110, 59 P.3d 58, 68 (2002); *State v. Tarter*, 111 Wn. App. 336, 340–41, 44 P.3d 889, 902 (2002). The item to be seized need not be at the place to be searched at the time the warrant is issued, but the magistrate must have reasonable grounds to believe it will be there at the time of the search. *State v. Maddox*, 116 Wn. App. 796, 804, 67 P.3d 1135, 1140 (2003) (magistrate could reasonably infer that drugs or evidence of drug dealing were in the defendant's home based on evidence that the defendant was dealing drugs from his home); *State v. McGovern*, 111 Wn. App. 495, 499–501, 45 P.3d 624, 626–27 (2002) (magistrate could infer that evidence of drug dealing would be found in defendant's home based on generalization that drug dealers keep drugs at their home plus additional facts suggesting that "*this* drug dealer probably keeps drugs at *his* or *her* residence"); *State v. Perez*, 92 Wn. App. 1, 7–8, 963 P.2d 881, 885 (1998) (sufficient facts supported inference of large-scale drug dealing to support search of alleged safe house); *Goble*, 88 Wn. App. at 509; *cf. State v. Thein*, 138 Wn.2d 133, 150, 977 P.2d 582, 590 (1999) (en banc) (magistrate could not infer that evidence might be found in the defendant's home based solely on generalization that drug dealers likely keep drugs at their homes). The State may not justify the issuance of a warrant with facts that arose after its issuance unless those facts were reasonably inferable at the time the warrant was issued. *Goble*, 88 Wn. App. at 508; *cf. State v. Mance*, 82 Wn. App. 539, 542, 918 P.2d 527, 529 (1996) (information obtained after a defendant's warrantless arrest cannot be used to support the initial probable cause for that arrest); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 3.7(d), at 412–438 (4th ed. 2004).

2.2(b) Quantum of Evidence Required

Probable cause is a quantum of evidence "less than . . . would justify . . . conviction," yet "more than bare suspicion." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S. Ct. 1302, 1310, 93 L. Ed. 1879, 1890 (1949). To make an arrest, the officer need not have facts sufficient to establish guilt beyond a reasonable doubt, but only reasonable grounds for suspicion coupled with evidence of circumstances sufficiently strong in themselves to justify a cautious and disinterested person in believing

that the suspect is guilty. *State v. Scott*, 93 Wn.2d 7, 11–12, 604 P.2d 943, 944–45 (1980) (en banc) (officers possessing description of car used in robbery and license number of similar car used in robbery involving similar modus operandi had probable cause to arrest persons who were driving a similar vehicle toward the address where the car's license number was traced).

The exact quantum of evidence required is unclear and may depend in part on the nature of the intrusion and the seriousness of the offense. *See generally* 2 LaFave, *supra*, § 3.2(e), at 66–71.

2.2(c) Individualized Suspicion

Probable cause to arrest an individual exists only if police have reasonable grounds to believe that the particular individual has committed the crime. *Maryland v. Pringle*, 540 U.S. 366, 371–74, 124 S. Ct. 795, 800–01, 157 L. Ed. 2d 769, 775–76 (2003) (noting that a police officer may reasonably infer a common enterprise among passengers in a vehicle, but that any inference must disappear if a guilty person among them is singled out by the government); *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 344, 62 L. Ed. 2d 238, 245 (1979); *State v. Smith*, 102 Wn.2d 449, 454–55, 688 P.2d 146, 149–50 (1984) (en banc) (police lacked reasonable suspicion when they failed to check the suspect for tattoos included in a warrant description and relied on tips from non-corroborated "street kids"); *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771, 775 (1980) (en banc) (defendant's mere presence in a high-crime area did not give rise to reasonable suspicion); *State v. DeArman*, 54 Wn. App. 621, 625, 774 P.2d 1247, 1249 (1989) (remaining motionless for 45 to 60 seconds at a stop sign but starting to move upon approach of an officer does not give rise to a reasonable suspicion of criminal activity).

There must be a sufficient nexus between the suspects to be searched and the criminal activity. *State v. Carter*, 79 Wn. App. 154, 158, 901 P.2d 335, 337 (1995). For example, in *Carter* the police sent a confidential informant to confirm complaints that an apartment was being used for illegal drug activity. *Id.* at 155–56. The informant observed residents and non-residents buying, selling, and using illegal drugs, but the informant was unable to identify any of the individuals by name. *Id.* at 156. Based upon the informant's observations, the police obtained a warrant to search "all 'persons at the residence at the time the warrant i[s] being served as well as persons arriving and leaving the residence at the time the warrant is being executed for controlled substances and papers of identification.'" *Id.* at 156. Upon execution of the warrant, the police found the defendant asleep on a mattress in the living room and

discovered rock cocaine in his pants pocket. *Id.* at 157. The court held that the warrant did not justify a search of the defendant's person because the observations of the informant did not support the conclusion that only illegal conduct occurred within the apartment and that any person present was likely to be involved with criminal activity "in such a way as to have evidence of the criminal activity on his person." *Id.* at 161 (quoting *Stokes v. State*, 604 So.2d 836, 838 (Fla. Dist. Ct. App. 1992)). However, the court carefully noted that it was not deciding whether warrants with "all persons present" language would be valid under different circumstances. *Id.*

Several exceptions exist, however, to establish authority of law without a warrant. Individual suspicion is not required when a stop involves neutral criteria. *See Illinois v. Lidster,* 540 U.S. 419, 423–24, 427, 124 S. Ct. 885, 889, 891, 157 L. Ed. 2d 843, 850, 852–53 (2004) (Fourth Amendment does not presumptively or automatically require that brief, information-seeking checkpoints on a highway be held unconstitutional, but they must be reasonable); *City of Seattle v. Yeager*, 67 Wn. App. 41, 46–47, 834 P.2d 73, 76 (1992) (police may conduct *Terry* stop to check validity of license when car had special license plate tabs indicating restricted license). *But cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42, 121 S. Ct. 447, 454, 148 L. Ed. 2d 333, 343 (2000) (drug checkpoints unconstitutional when primary purpose was to uncover evidence of ordinary criminal wrongdoing); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 458, 755 P.2d 775, 777 (1988) (en banc) (sobriety checkpoints violate state constitution).

A warrantless search without individualized suspicion may also be upheld in order to permit officers to investigate if the officers reasonably believe that a felony has been committed and if there is a high probability that the suspect will be found in the place to be searched. *State v. Silvernail*, 25 Wn. App. 185, 189–91, 605 P.2d 1279, 1282–83 (1980) (roadblock in which police stopped all cars exiting a ferry was proper, despite lack of individualized suspicion, because the police had probable cause to believe that suspects involved violent felony were on board).

Individualized suspicion is not required for some administrative searches as well. *See generally infra* § 6.4(b), (c).

2.3 INFORMATION CONSIDERED: IN GENERAL

A court reviewing a probable cause determination considers only the information that was available to the magistrate at the time that the warrant was issued to the officer. *See Wong Sun v. United States*, 371 U.S. 471, 481–82, 83 S. Ct. 407, 414, 9 L. Ed. 2d 441, 451–52 (1963); *State v. Murray*, 110 Wn.2d 706, 709–10, 757 P.2d 487, 488 (1988) (en

banc). Probable cause must be based on facts and not on mere conclusions. *Aguilar v. Texas*, 378 U.S. 108, 113, 84 S. Ct. 1509, 1513, 12 L. Ed. 2d 723, 727 (1964); *State v. Thein*, 138 Wn.2d 133, 145–47, 977 P.2d 582, 588 (1999) (en banc). In addition, probable cause must exist at the actual time of arrest or search and it cannot be stale. *See United States v. Leon*, 468 U.S. 897, 904, 104 S. Ct. 3405, 3411, 82 L. Ed. 2d 677, 686 (1984); *State v. Maddox*, 152 Wn.2d 499, 505-06, 98 P.3d 1199, 1202 (2004) (en banc) (delay in executing a warrant "may render the magistrate's probable cause determination stale" but common sense is the test for staleness based on the facts and circumstances identified in the affidavit).

Affidavits for search warrants must be tested in a commonsense, non-hypertechnical manner. *In re Yim*, 139 Wn.2d 581, 597, 989 P.2d 512, 520 (1999); *State v. Fisher*, 96 Wn.2d 962, 965, 639 P.2d 743, 745 (1982) (en banc); *see infra* § 3.3(b). "The support for issuance of a search warrant is sufficient if, on reading the affidavits, an ordinary person would understand that a violation existed and was continuing at the time of the application." *Fisher*, 96 Wn.2d at 965 (quoting *State v. Clay*, 7 Wn. App. 631, 637, 501 P.2d 603, 607 (1972)). All doubts are resolved in favor of the warrant's validity. *Maddox*, 152 Wn.2d at 509; *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593, 604 (1994) (en banc); *State v. Olson*, 73 Wn. App. 348, 354, 869 P.2d 110, 113–14 (1994); *State v. Kennedy*, 72 Wn. App. 244, 248, 864 P.2d 410, 412 (1993); *State v. Wilke*, 55 Wn. App. 470, 476, 778 P.2d 1054, 1058 (1989).

Information need not be admissible at trial in order to support probable cause. *Brinegar v. United States*, 338 U.S. 160, 173, 69 S. Ct. 1302, 1309, 93 L. Ed. 1879, 1889 (1949); *Bokor v. Dep't of Licensing*, 74 Wn. App. 523, 526, 874 P.2d 168, 169 (1994). For example, marital privilege does not prevent a spouse's statements from being used to establish probable cause. *State v. Bonaparte*, 34 Wn. App. 285, 289, 660 P.2d 334, 336 (1983). *See generally infra* § 7.3.

"[A] search warrant [will] not [be] rendered totally invalid if the affidavit contains sufficient facts to establish probable cause independent of the illegally obtained information." *State v. Coates*, 107 Wn.2d 882, 887, 735 P.2d 64, 67 (1987) (en banc). In *Coates*, for example, the police obtained a search warrant based partially on facts that were obtained in violation of the defendant's right to remain silent. *Id.* However, the court upheld the search warrant because other facts in the affidavit supported a finding of probable cause. *Id.* at 888.

2.3(a) Hearsay

Hearsay from an informant can establish probable cause for a warrant as long as there is evidence providing reason to believe that the informant is reliable and has an adequate basis of knowledge. *Spinelli v. United States*, 393 U.S. 410, 416, 89 S. Ct. 584, 589, 21 L. Ed. 2d 637, 643 (1969); *Aguilar*, 378 U.S. at 113–14, 84 S. Ct. at 1513–14, 12 L. Ed. 2d at 727–29; *State v. Huft*, 106 Wn.2d 206, 209–10, 720 P.2d 838, 839–40 (1986) (en banc) (tip regarding marijuana growing operation was found insufficient because the basis of the informant's knowledge was not shown); *State v. Jackson*, 102 Wn.2d 432, 437–38, 688 P.2d 136, 140 (1984) (en banc) ("If the informant's information is hearsay, the basis of knowledge prong can be satisfied if there is sufficient information so that the hearsay establishes a basis of knowledge."); *State v. Lund*, 70 Wn. App. 437, 449–50 n.9, 853 P.2d 1379, 1387 n.9 (1993) (noting a strong motive to be truthful and an admission against penal interest can both demonstrate veracity). As a result, a magistrate may rely on a police officer's affidavit or other testimony that relays hearsay information based on a fellow officer's personal knowledge. *State v. Lodge*, 42 Wn. App. 380, 386, 711 P.2d 1078, 1083 (1985). The affidavit may also relate hearsay from informants as long as there is a basis for crediting it. *Huft*, 106 Wn.2d at 209–10; *Lund*, 70 Wn. App. at 449–50 n.9.

Multiple hearsay may also be considered if the requirements are met for each person in the chain of information. *See Huft*, 106 Wn.2d at 209–10 (concerned citizen information not sufficient without basis of informant's knowledge); *State v. Vanzant*, 14 Wn. App. 679, 683, 544 P.2d 786, 789 (1975) (information passed to second detective by detective with personal knowledge of informant's reliability sufficient to establish probable cause for arrest). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.2(d), at 56–59 (4th ed. 2004).

2.3(b) Prior Arrests, Prior Convictions, and Reputation

A magistrate or police officer making a probable cause determination may consider prior convictions that have probative value to the specific probable cause inquiry. *Brinegar*, 338 U.S. at 173–74, 69 S. Ct. at 1309–10, 93 L. Ed. at 1889; *State v. Vickers*, 148 Wn.2d 91, 111 n.51, 59 P.3d 58, 68 n.51 (2002) (en banc); *State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006, 1015 (2001) (en banc) (defendant's prior conviction was "helpful in establishing probable cause" when the conviction was of the same general nature as the crime under investigation); *State v. Sterling*, 43 Wn. App. 846, 851, 719 P.2d 1357, 1359 (1986) (occupant's two prior convictions for narcotics can be a factor in determining probable cause). Without additional evidence, a prior record of the same type of

criminal conduct is insufficient to establish probable cause. *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142, 148 (1964); *State v. Hobart*, 94 Wn.2d 437, 446, 617 P.2d 429, 434 (1980) (en banc). However, prior acts may establish probable cause when the modus operandi is similar and distinctive. *See* 2 LaFave, *supra*, § 3.2(d), at 60–66.

A prior criminal record does not justify a warrantless search. *Hobart*, 94 Wn.2d at 446; *State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090, 1095 (1996). *See* 2 LaFave, *supra*, § 3.2(d), at 56–59.

A general assertion of criminal reputation is insufficient to establish probable cause. *Spinelli*, 393 U.S. at 416, 89 S. Ct. at 589, 21 L. Ed. 2d at 643–44. *But see United States v. Harris*, 403 U.S. 573, 583, 91 S. Ct. 2075, 2081–82, 29 L. Ed. 2d 723, 733 (1971) (plurality opinion) (noting that an officer's knowledge of a suspect's reputation is a "practical consideration of everyday life" upon which an officer may rely in determining the reliability of an informant). Specific facts leading to a conclusion that a suspect has a bad reputation may be considered. *See* 2 LaFave, *supra*, § 3.2(d), at 56–59.

2.3(c) Increased Electrical Consumption

Standing alone, an increase in electrical use does not constitute sufficient probable cause to issue a search warrant. *Olson*, 73 Wn. App. at 356; *Sterling*, 43 Wn. App. at 851; *State v. McPherson*, 40 Wn. App. 298, 301, 698 P.2d 563, 564 (1985). Evidence of increased power consumption, absent other information, is an innocuous fact and cannot corroborate an anonymous tip of suspected criminal activity. *Young*, 123 Wn.2d at 196. *See also Huft*, 106 Wn.2d at 211 ("[T]here are too many plausible reasons for increased electrical use to allow a search warrant to be issued based on increased consumption."). When the increase in power consumption is combined with other factors, however, the increase may be considered in determining whether probable cause exists. *State v. Cole*, 128 Wn.2d 262, 291, 906 P.2d 925, 942 (1995) (en banc) (increase in electrical consumption is a proper factor in determining probable cause when combined with other suspicious factors); *Young*, 123 Wn.2d at 195; *Sterling*, 43 Wn. App. at 851–52 (400–500% increase in power usage combined with suspicious facts supported probable cause for search warrant). *But see State v. Rakovsky*, 79 Wn. App. 229, 239, 901 P.2d 364, 370 (1995) (evidence of power use three to four times greater than the previous occupant's, as well as the absence of accumulated snow on the roof when neighboring buildings had 20 to 30 inches, did not constitute probable cause). An individual has a protected privacy interest in power usage records such that a disclosure of this information is prohibited unless there is written notice to the utility company that the

person is suspected of criminal activity. RCW 42.17.314 (prohibiting the inspection or copy of a person's utility records by law enforcement unless the utility is provided a written statement that indicates the person is suspected of committing a crime and there is a reasonable belief that the records could determine or help determine whether the suspicion is true). *See generally Cole*, 128 Wn.2d at 290 (a search warrant satisfies the requirements of RCW 42.17.314); *In re Maxfield*, 133 Wn.2d 332, 341–42, 945 P.2d 196, 201 (1997) (en banc) (no reasonable suspicion of criminal activity because electrical service was new and records showed high electrical consumption pottery kilns were to be used at location); *State v. Maxwell*, 114 Wn.2d 761, 767–69, 791 P.2d 223, 225–26 (1990) (en banc) (telephonic request for utility record not admissible because verbal request was in violation of RCW 42.17.314); *In re Request of Rosier*, 105 Wn.2d 606, 613–16, 717 P.2d 1353, 1358–59 (1986) (en banc) (recognizing the need to balance the public's interest in disclosure of information leading to arrests and the individual and societal interest in preventing "fishing expeditions" by the government).

2.3(d) Polygraph Results

The results of a polygraph test may be considered in a magistrate's probable cause determination, even though such results are inadmissible at trial unless stringent conditions are satisfied. *Clark*, 143 Wn.2d at 749–50. Although the qualifications of the FBI agent who administered the polygraph test in *Clark* were not set forth in the affidavit, the court noted that information from a reliable informant has corroborative value even if the informant's basis of knowledge is not specified. *Id.* (citing *State v. Lair*, 95 Wn.2d 706, 712, 630 P.2d 427, 431 (1981) (en banc)). In *Clark*, the FBI agent's basis of knowledge was the administration of the polygraph test and his clinical and common sense observation of Clark's performance. *Id.*

2.4 Law Enforcement Officers' First-Hand Observations

Because the existence of probable cause is dependent on a fact-based inquiry, it is impossible to define broadly when an officer's observations are sufficient to constitute probable cause. However, the following common factual situations provide some general guidance.

2.4(a) Particular Crimes: Stolen Property

Suspicious conduct suggesting that property is stolen does not always establish probable cause. For example, when officers saw two men park a car in an alley, load it with cartons, drive away, and later return

and repeat their conduct, the officers did not have probable cause to believe that the cartons contained stolen property. *Henry v. United States*, 361 U.S. 98, 103, 80 S. Ct. 168, 171–72, 4 L. Ed. 2d 134, 139 (1959).

In one case, officers stopped a vehicle after learning that its owner had an outstanding warrant for a traffic violation. *State v. Glasper*, 84 Wn.2d 17, 18, 523 P.2d 937, 938 (1974) (en banc). The police then saw an unpadded, unsecured television in the open trunk. *Id.* A passenger in the car claimed ownership of the set, but was unable to identify the brand. *Id.* at 18. The court held that the police had reasonable cause to believe that the television was stolen. *Id.* at 21. Similarly, items wrapped in a blanket on a street and thrown into bushes when police approached were indicative of stolen property when police had previous experience with similar situations. *State v. Barber*, 118 Wn.2d 335, 337–38, 823 P.2d 1068, 1069 (1992) (en banc). However, in another case, the existence of an expensive briefcase in a car not reported stolen was not sufficient to establish probable cause for a vehicle search. *State v. Ozuna*, 80 Wn. App. 684, 688–89, 911 P.2d 395, 397–98 (1996). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.6(a), at 304–309 (4th ed. 2004).

2.4(b) Particular Crimes: Illegal Substances

The odor of an illegal substance may establish probable cause, as long as the odor is detected by someone trained and experienced in detecting illegal substances. *State v. Jacobs*, 121 Wn. App. 669, 678, 89 P.3d 232, 238 (2004); *State v. Olson*, 73 Wn. App. 348, 356, 869 P.2d 110, 114 (1994) (trained officer's detection of marijuana odor); *State v. Vonhof*, 51 Wn. App. 33, 41–42, 751 P.2d 1221, 1226 (1988) (odor combined with experience in smelling the illegal substance constituted probable cause). The affidavit must set forth the officer's training and experience in identifying the odor. *See State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 282, 285 (1992). But if the officer's experience and education is not in the affidavit, the omission is not fatal to the search warrant's validity if other facts in the affidavit demonstrate probable cause. *Jacobs*, 121 Wn. App. at 678. Odor may also be used in concert with other suspicious activities to establish probable cause. *See State v. Huff*, 64 Wn. App. 641, 647–48, 826 P.2d 698, 701–02 (1992) (odor of methamphetamine combined with furtive gestures and lying to police during car stop created probable cause).

In the case of a drug enforcement dog sniff, an alert establishes probable cause if the dog's training and reliability are known to the officers and set forth in the affidavit for a warrant. *State v. Jackson*, 82 Wn. App. 594, 606–07, 918 P.2d 945, 952–53 (1996) (alert by police dog af-

ter temporary seizure of Federal Express package constituted probable cause); *State v. Flores-Moreno*, 72 Wn. App. 733, 740–41, 866 P.2d 648, 652–53 (1994) (probable cause established from observations of drug deal combined with positive canine sniff); *State v. Stanphill*, 53 Wn. App. 623, 632, 769 P.2d 861, 866 (1989) (corroborating canine sniff overcame any deficiency in the reliability of an informant).

Identification of substances must also be accompanied by evidence of the officer's expertise and training in identifying the substance in order to establish probable cause. *State v. Graham*, 130 Wn.2d 711, 724, 725, 927 P.2d 227, 234 (1996) (en banc); *State v. Solberg*, 66 Wn. App. 66, 79, 831 P.2d 754, 761 (1992), *rev'd on other grounds*, 122 Wn.2d 688, 861 P.2d 460 (1993) (en banc) (officer's experience in identifying marijuana grow operations); *State v. Fore*, 56 Wn. App. 339, 343–44, 783 P.2d 626, 629 (1989) (officer training relevant to surveillance of drug transactions in park). Absolute certainty as to the identity of the substance is not required. *Graham*, 130 Wn.2d at 725 (quoting *Fore*, 56 Wn. App. at 345).

However, the officer's experience and training on the characteristics of those who cultivate illegal substances, without more, is not enough to establish probable cause. *Olson*, 73 Wn. App. at 357 (officer's experience that those who cultivate marijuana usually hide records and materials in a safe house under their control does not satisfy probable cause for search warrant of the safe house premises). *But compare State v. Perez*, 92 Wn. App. 1, 7–8, 963 P.2d 881, 885 (1998) (sufficient facts supported inference of large scale drug dealing to support search of alleged safe house) *with State v. Thein*, 138 Wn.2d 133, 150, 977 P.2d 582, 590 (1999) (en banc) (magistrate could not infer that evidence might be found in the defendant's home based solely on generalization that drug dealers likely keep drugs at their home). *See* 2 LaFave, *supra*, § 3.6(b), at 309–331.

2.4(c) Association: Persons and Places

Because of the individualized suspicion requirement, mere association with a person whom police have grounds to arrest does not constitute probable cause for arrest. *United States v. Di Re*, 332 U.S. 581, 587, 68 S. Ct. 222, 225, 92 L. Ed. 210, 216 (1948) (search of a car passenger unjustified when the driver was arrested for possession of counterfeit ration coupons). Mere proximity to others suspected of criminal activity does not in itself establish probable cause for a search of the associate. *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238, 245 (1979); *State v. Crane*, 105 Wn. App. 301, 312, 19 P.3d 1100, 1106 (2001); *State v. Dorsey*, 40 Wn. App. 459, 466, 698 P.2d 1109, 1113

(1985) (probable cause based on association with others engaged in criminal activity requires an additional circumstance that reasonably implies knowledge of or participation in that activity). Race or color alone, including "racial incongruity" ("a person of any race being allegedly 'out of place' in a particular geographic area") can never constitute probable cause of criminal activity. *Barber*, 118 Wn.2d at 346; *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 885–87, 95 S. Ct. 2574, 2582–83, 45 L. Ed. 2d 607, 619–20 (1975); *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982).

An individual's presence in a high-crime area is not sufficient, by itself, to establish probable cause. *See Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357, 362–63 (1979); *Crane*, 105 Wn. App. at 312. Suspicion of dangerousness must relate to the person searched, not to the area in which he is found. *State v. Smith*, 102 Wn.2d 449, 452–53, 688 P.2d 146, 148 (1984) (en banc) (general practice of frisking individuals in particularly dangerous area of the city is not justified by probable cause). *See generally* 2 LaFave, *supra*, § 3.6(g), at 366–370.

2.4(d) Furtive Gestures and Flight

A suspect's furtive gestures or flight, without more, cannot establish probable cause; however, they may be a factor in determining whether probable cause exists. *Illinois v. Wardlow*, 528 U.S. 119, 123–24, 120 S. Ct. 673, 675–76, 145 L. Ed. 2d 570, 575–76 (2000) (finding reasonable suspicion based on suspect's presence in area known for heavy drug trafficking and suspect's unprovoked flight upon police arrival); *Sibron v. New York*, 392 U.S. 40, 66–67, 88 S. Ct. 1889, 1904, 20 L. Ed. 2d 917, 936–37 (1968) (probable cause existed when strangers tiptoed from apartment and fled from police officer); *Graham*, 130 Wn.2d at 725–26 (finding probable cause when the defendant quickly concealed an object in his pants pockets, ignored the officers' request to stop, looked nervous, and sweated profusely on a cold night); *State v. Hobart*, 24 Wn. App. 240, 243, 600 P.2d 660, 662 (1979), *rev'd on other grounds*, 94 Wn.2d 437, 617 P.2d 429 (1980) (en banc) (defendant grabbed his pocket and turned away from an officer after the officer asked if the defendant had cocaine in his pocket). Furtive gestures, evasive behavior, and flight from police are circumstantial evidence of criminal activity. *Graham*, 130 Wn.2d at 725–26 (concealing item that looked like rock cocaine in hand, ignoring an officer's request to stop, and profuse sweating in cold temperature); *State v. Glover*, 116 Wn.2d 509, 514–15, 806 P.2d 760, 762–63 (1991) (en banc) (defendant's conduct of turning away from the officers, walking faster, playing with his

ballcap, and looking toward the officers and then looking away, coupled with officer's disbelief of defendant's statement that he lived at housing complex constituted probable cause for criminal trespass); *State v. Baxter*, 68 Wn.2d 416, 421–22, 413 P.2d 638, 642 (1966) (flight is an element of probable cause); *Huff*, 64 Wn. App. at 647 (furtive movements and lying to police about identity support probable cause); *cf. State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771, 775 (1980) (en banc) (suspect's leaving at the time a police cruiser arrives does not necessarily lead to the conclusion that it is reasonable to suspect the person of committing a crime).

However, probable cause is not negated merely because it is possible to imagine an innocent explanation for observed activities. *Graham*, 130 Wn.2d at 725 (quoting *Fore*, 56 Wn. App. at 344) (noting that absolute certainty as to the identity of a suspicious substance is not required).

2.4(e) Response to Questioning

When combined with other circumstances, a suspect's response to police questioning can establish probable cause. *United States v. Ortiz*, 422 U.S. 891, 897, 95 S. Ct. 2585, 2588, 45 L. Ed. 2d 623, 629 (1975) (border patrol may consider nature of responses to questioning to help establish probable cause). *See also Huff*, 64 Wn. App. at 647 (lying to police about identity coupled with furtive gestures and identification of illegal substance odor established probable cause); *Glover*, 116 Wn.2d at 514 (officer's disbelief of defendant's statement that he lived at housing complex, combined with suspicious gestures, constituted probable cause for criminal trespass).

A suspect's failure or refusal to answer an officer's questions, however, may not be taken into account. *State v. White*, 97 Wn.2d 92, 106, 640 P.2d 1061, 1069 (1982) (en banc); *see Brown*, 443 U.S. at 53 n.3, 99 S. Ct. at 2641 n.3, 61 L. Ed. 2d at 363 n.3. *See generally* 2 LaFave, *supra*, § 3.6(f), at 360–66. Similarly, a suspect's silence after Miranda warnings have been given may not be considered in determining probable cause. *Doyle v. Ohio*, 426 U.S. 610, 617–18, 96 S. Ct. 2240, 2244–45, 49 L. Ed. 2d 91, 97–98 (1976). Nor may the suspect's failure to challenge the officer's actions be considered. *Di Re*, 332 U.S. at 594, 68 S. Ct. at 228, 92 L. Ed. at 220 (officers could not infer probable cause from suspect's failure to protest arrest or to proclaim innocence).

Although the United States Supreme Court has held that the Fourth Amendment cannot compel a suspect to answer questions, a state may make it a crime for a suspect to refuse to identify herself if the request for identification is reasonably related to the circumstances that justified the investigative stop. *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt*

County, 124 S. Ct. 2451, 2459–60, 159 L. Ed. 2d 292, 303–05 (2004); *see State v. Turner*, 103 Wn. App. 515, 525–26, 13 P.3d 234, 239–40 (2000) (holding the defendant's refusal to provide his name combined with the defendant's lunging at the officer were sufficient to satisfy a conviction for obstruction of justice); *State v. Contreras*, 92 Wn. App. 307, 316, 966 P.2d 915, 919 (1998) (recognizing the defendant's right to refuse to answer questions, but including the defendant's failure to provide his name upon request as one reason that supported a charge for obstruction of justice). *See generally* RCW 9A.76.020(1) (Washington's obstruction of justice statute).

2.5 INFORMATION FROM AN INFORMANT: IN GENERAL

Different sets of rules govern information received from an informant depending on whether the informant is a criminal informant, a citizen informant, a police informant, or an anonymous informant. This section discusses general rules that apply to all informants; section 2.6 focuses on citizen informants; section 2.7 covers the rules for when the informant is a fellow police officer; and section 2.8 deals with anonymous informants.

Traditionally, under the Fourth Amendment, information from an informant could establish probable cause only when the facts and circumstances available to the police satisfied the two-prong *Aguilar-Spinelli* test requiring that an informant's basis of knowledge and reliability be established. *Spinelli v. United States*, 393 U.S. 410, 415–16, 89 S. Ct. 584, 588–89, 21 L. Ed. 2d 637, 643 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 1514, 12 L. Ed. 2d 723, 729 (1964); *see* 2 Wayne R. LaFave, *Search and Seizure* § 3.3(a), at 99–105 (4th ed. 2004). *See generally State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58, 68–69 (2002) (en banc) (affidavit must establish informant's basis of knowledge and veracity); *State v. Bauer*, 98 Wn. App. 870, 874–75, 991 P.2d 668, 671 (2000).

Under the "basis of knowledge" prong of the test, facts must be revealed that enable the person making the probable cause determination to decide whether the informant had a basis for the allegation of criminal conduct. Under the "veracity" prong, facts must be presented so that the magistrate can determine either the inherent credibility of the informant or the reliability of the informant on the particular occasion. *Spinelli*, 393 U.S. at 415–16, 89 S. Ct. at 588–89, 21 L. Ed. 2d at 643; *State v. Jackson*, 102 Wn.2d 432, 435, 688 P.2d 136, 138–39 (1984) (en banc). An informant's tip may provide police with grounds to stop a person only if there is some indicia of reliability. *State v. Smith*, 102 Wn.2d 449, 455, 688 P.2d 146, 150 (1984) (en banc) (officers' reliance on street kids to

lead them to suspect is not permissible when the officers questioned the reliability of children). If either the basis of knowledge or veracity prong is deficient, the police may cure the deficiency by corroborating the informant's tip through an independent investigation. *Vickers*, 148 Wn.2d at 112. So long as each link in the chain of information satisfies the two-prong test, multiple hearsay may be considered. *United States v. Carmichael*, 489 F.2d 983, 986 (7th Cir. 1973); *State v. Morehouse*, 41 Wn. App. 334, 336, 704 P.2d 168, 169 (1985); *State v. Luellen*, 17 Wn. App. 91, 94, n.1, 562 P.2d 253, 255, n.1 (1977) (noting that hearsay-on-hearsay may not always be sufficient to establish probable cause, but the facts provided a substantial basis for crediting the hearsay).

In 1983, the United States Supreme Court replaced the *Aguilar-Spinelli* test with a totality of the circumstances approach for determining when an informant's tip may establish probable cause. *Illinois v. Gates*, 462 U.S. 213, 231–32, 103 S. Ct. 2317, 2320, 76 L. Ed. 2d 527, 530 (1983). The Washington State Supreme Court, however, has held that Article I, Section 7 of the Washington Constitution requires adherence to the two-prong *Aguilar-Spinelli* test. *Vickers*, 148 Wn.2d at 111–12 (citing *Jackson*, 102 Wn.2d at 440). A Washington trial court may not use the *Gates* "totality of the circumstances" test. *State v. Gaddy*, 152 Wn.2d 64, 71 n.2, 93 P.3d 872, 876 n.2 (2004) (en banc); *State v. Huft*, 106 Wn.2d 206, 209–10, 720 P.2d 838, 840 (1986) (en banc); *Jackson*, 102 Wn.2d at 443. *See* 2 LaFave, *supra*, § 3.3(a), at 99–113.

2.5(a) Satisfying the "Basis of Knowledge" Prong by Personal Knowledge

The best way to satisfy the "basis of knowledge" prong is to show that the informant based his or her information on personal knowledge. *See, e.g., Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 1514, 12 L. Ed. 2d 723, 729 (1964); *Vickers*, 148 Wn.2d at 112; *State v. Wolken*, 103 Wn.2d 823, 827, 700 P.2d 319, 321 (1985) (en banc); *Jackson*, 102 Wn.2d at 437; *Bauer*, 98 Wn. App. at 875. For example, an informant's statement that he had observed the defendant selling narcotics will satisfy the basis of knowledge prong. *McCray v. Illinois*, 386 U.S. 300, 304, 87 S. Ct. 1056, 1059, 18 L. Ed. 2d 62, 67 (1967). *But see* 2 LaFave, *supra*, § 3.3(a), at 100–01 (criticizing *McCray* for failing to require a showing that the informant knew the substance was a narcotic). The affidavit need only show that the informant had personal knowledge of the facts asserted. *Vickers*, 148 Wn.2d at 113 (affidavit did not need to establish that informant had actually seen the weapons or ammunition used in a robbery, but that the informant had personal knowledge of the facts asserted

in the affidavit regarding the defendants' conversations about committing an armed robbery).

The basis of an informant's knowledge may also be established by hearsay. *See Huft*, 106 Wn.2d at 211, 720 P.2d at 841 (1986); *Jackson*, 102 Wn.2d at 437. Similarly, an informant's statement from which the court may infer the informant's first-hand knowledge of criminal activity will satisfy this prong. *State v. Anderson*, 41 Wn. App. 85, 95, 702 P.2d 481, 489 (1985), *rev'd on other grounds*, 107 Wn.2d 745, 733 P.2d 517 (1987). However, an informant's personal knowledge of innocuous facts about the defendant is insufficient to satisfy the basis of knowlege prong without allegations establishing the informant's personal knowledge of the criminal act. *State v. Young*, 123 Wn.2d 173, 196, 867 P.2d 593, 603 (1994) (en banc); *Huft*, 106 Wn.2d at 211.

Under Article I, Section 7 of the Washington State Constitution, a deficiency in the basis of knowledge prong may be remedied by "independent police investigatory work that corroborates the tip to such an extent that it supports the missing elements . . . ." *Jackson*, 102 Wn.2d at 438. *See also State v. Kennedy*, 72 Wn. App. 244, 249–50, 864 P.2d 410, 413–14 (1993); *State v. Adame*, 39 Wn. App. 574, 576–77, 694 P.2d 676, 678 (1985). Thus, the credibility of an informant may be established by police verification of the informant's statement of detailed criminal activity not generally known or readily available. *Anderson*, 41 Wn. App. at 94–95; *see State v. Shaver*, 116 Wn. App. 375, 380–81, 65 P.3d 688, 690–91 (2003) (confidential informant's credibility corroborated by officer's ongoing investigation of drug activity at a residence for many years prior to informant's tip and officer's observations that residence was frequented by known drug users). The corroborated information must itself suggest criminal activity. "Merely verifying 'innocuous details,' commonly known facts or easily predictable events should not suffice to remedy [the] deficiency . . . ." *Jackson*, 102 Wn.2d at 438; *State v. Maddox*, 116 Wn. App. 796, 803, 67 P.3d 1135, 1139 (2003), *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004) (corroboration of alleged drug dealing sufficient when police searched informant before a controlled buy, observed his entrance and exit, and then re-searched the informant after the controlled buy); *State v. Maxwell*, 114 Wn.2d 761, 769–70, 791 P.2d 223, 227 (1990) (en banc) (informant's observation of frequent visitors, tin foil on windows, and suspicious conversation not sufficient evidence of illegal activity); *Kennedy*, 72 Wn. App. at 249–50 (innocuous facts combined with suspicious activity in outdoor resort sufficient to corroborate suspicion of drug activity); *State v. Chatmon*, 9 Wn. App. 741, 747, 515 P.2d 530, 534–35 (1973) (police corroboration of an informant's description of a vehicle and its occupants was insufficient to raise a rea-

sonable inference of criminal activity). However, the information may be used to corroborate other cognizable information even if the informant's basis of knowledge is not shown. *State v. Lund*, 70 Wn. App. 437, 450 n.10, 853 P.2d 1379, 1387–88 n.10 (1993) (anonymous police informant's tip of possible drug activity in prison not enough to establish probable cause, but could be considered in corroborating another police informant's similar information and for independent police investigation of tip); *State v. Lair*, 95 Wn.2d 706, 712, 630 P.2d 427, 431 (1981) (en banc) (hearsay or conclusory statements relayed by a reliable informant may establish probable cause when used to corroborate information provided by an informant whose reliability has not yet been established). *See generally* 2 LaFave, *supra*, § 3.3(f), at 174–202.

2.5(b) Satisfying the "Veracity" Prong by Past Performance

The veracity prong of the *Aguilar-Spinelli* test may be met if the affidavit supporting the search warrant contains sufficient facts from which a magistrate can independently determine the veracity of the informant. *Vickers*, 148 Wn.2d at 112; *Maddox*, 116 Wn. App. at 803, *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004) (informant's "track record" of two successful controlled buys sufficient to support an inference of veracity). A mere conclusion that the informant is a "credible person" is insufficient; reasons for believing the informant to be credible must be presented. *Aguilar*, 378 U.S. at 112, 84 S. Ct. at 1515, 12 L. Ed. 2d at 727; *Jackson*, 102 Wn.2d at 437; *Lund*, 70 Wn. App. at 449–50 n.10.

The fact that an informant's past information has led to convictions is a sufficient showing of reliability. *Jackson*, 102 Wn.2d at 437. An informant's reliability may also be established if the informant has previously provided information that was proven to be reliable even though it did not result in an arrest. *Shaver*, 116 Wn. App. at 380–81 (confidential informant had provided reliable information to the officer in the past); *see* 2 LaFave, *supra*, § 3.3(b), at 113–131.

An informant who has assisted in an arrest may be credible. *State v. Lopez*, 70 Wn. App. 259, 264, 856 P.2d 390, 393 (1993) (informant's successful assistance in controlled buys established a track record of reliability); *Wolken*, 103 Wn.2d at 827 (informant's reliability established by previously providing information to authorities). Some courts have read *Aguilar* to hold that general statements alleging past reliability of the defendant are sufficient. *See* 2 LaFave, *supra*, § 3.3(b), at 113–131.

In the absence of circumstances showing unreliability, an officer need not have personal knowledge of the informant's track record, but may rely on information from fellow officers. *State v. Vanzant*, 14 Wn. App. 679, 681–82, 544 P.2d 786, 788 (1975); *see infra* § 2.7(b).

2.5(c) Satisfying the "Veracity" Prong by Admissions Against Interest and by Motive

Hearsay from an informant can establish probable cause for a warrantless search, as long as there is evidence of a reason to believe that the informant is reliable, including the motive for the informant to be truthful. *State v. Bean*, 89 Wn.2d 467, 469–71, 572 P.2d 1102, 1103–04 (1978) (en banc) (offer of a favorable sentence recommendation gave informant a strong motive to provide accurate information); *Lund*, 70 Wn. App. at 439–40, 449–50 n.9 (inmate had strong motivation to provide reliable information about prison drug smuggling when it was exchanged for benefits for his own criminal case); *State v. Estorga*, 60 Wn. App. 298, 305, 803 P.2d 813, 817 (1991) (offer to drop charges in exchange for accurate information established strong motive to be truthful); *State v. Smith*, 39 Wn. App. 642, 647, 694 P.2d 660, 663 (1984) (offer of reduction in charge from felony to misdemeanor gave informant strong motive to be truthful).

A statement against penal interest can also establish an adequate basis of knowledge. *Spinelli*, 393 U.S. at 425, 89 S. Ct. at 593, 21 L. Ed. 2d at 649 (White, J., concurring); *Shaver*, 116 Wn. App. at 380–81 (confidential informant relayed comments against penal interest made by suspected drug dealer); *Lund*, 70 Wn. App. at 449-50 n.10 (informant heard inmate's admission against penal interest that he was receiving drugs smuggled into the prison by his attorney).

2.6 CITIZEN INFORMANTS: VICTIM/WITNESS INFORMANTS IN GENERAL

The Aguilar-Spinelli test also applies to the use of information from a citizen informant, such as a victim or witness. *State v. Wible*, 113 Wn. App. 18, 22, 51 P.3d 830, 833 (2002) (affidavit must set forth the informant's basis of knowledge and reliability); *State v. Tarter*, 111 Wn. App. 336, 340, 44 P.3d 899, 901 (2002) (*Aguilar-Spinelli* test applied where informants were named citizens); *State v. McReynolds*, 104 Wn. App. 560, 572–73, 17 P.3d 608, 616 (2001) (citizen informant was readily identifiable through affidavit). *But see State v. Nordlund*, 113 Wn. App. 171, 181, 53 P.3d 520, 524 (2002) (State did not need to show the credibility and reliability of citizen informants who supplied noncriminal and nonaccusatory information which the magistrate could have inferred was based on personal knowledge).

Personal knowledge can be established by an informant's personal observations. *Wible*, 113 Wn. App. at 23; *Tarter*, 111 Wn. App. at 340. The reliability of a named informant is presumed reliable if the circumstances which establish personal knowledge are sufficiently detailed.

State v. Gaddy, 114 Wn. App. 702, 707, 60 P.3d 116, 120 (2003); *Wible*, 113 Wn. App. at 24 (no independent corroboration required); *Tarter*, 111 Wn. App. at 340 (State's burden is "relaxed" with regard to the veracity of citizen informants); *McReynolds*, 104 Wn. App. at 572–73 (informant was readily identifiable from affidavit and provided information in "entirely unsuspicious circumstances"); *State v. Bauer*, 98 Wn. App. 870, 876 n.5, 991 P.2d 668, 671 n.5 (2000) (noting lack of authority for defendant's argument that a citizen informant becomes a professional informant-for-hire if the citizen is interested in a public hotline financial award).

A higher showing of credibility is required for a citizen informant whose identity is known by the police but is not revealed to the magistrate. *Bauer*, 98 Wn. App. at 876–77 (credibility established by facts that informant was a concerned citizen, had been a Washington citizen for more than nine years, was a registered voter, and feared retaliation). Again, multiple hearsay is acceptable as long as each instance in the chain meets the two-prong test. *See, e.g.*, *United States v. Wilson*, 479 F.2d 936, 940–41 (7th Cir. 1973) (tip by service station employee about stolen credit card from phone call to American Express was reliable); *State v. Huft*, 106 Wn.2d 206, 209–10, 720 P.2d 838, 840 (1986) (concerned citizen information not sufficient without basis of informant's knowledge); *State v. Vanzant*, 14 Wn. App. 679, 683, 544 P.2d 786, 789 (1975) (information passed to second detective by detective with personal knowledge of informant's reliability sufficient to establish probable cause for arrest). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 3.4, at 218–269 (4th ed. 2004).

Naming an informant is not a sufficient ground on which to credit an informer; it is, however, considered in the determination of whether the informant is actually a citizen informant. *State v. Duncan*, 81 Wn. App. 70, 78, 912 P.2d 1090, 1095 (1996); *State v. Rodriguez*, 53 Wn. App. 571, 576, 769 P.2d 309, 312 (1989).

2.6(a) Satisfying the "Basis of Knowledge" Prong

The basis for the citizen informant's knowledge must be established. *See Huft*, 106 Wn.2d at 211. Information showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the basis of the knowledge prong. *State v. Smith*, 110 Wn.2d 658, 663, 756 P.2d 722, 725 (1988) (en banc); *State v. Jackson*, 102 Wn.2d. 432, 437, 688 P.2d 136, 140 (1984) (en banc). However, if the facts come from one who is not the eyewitness, or when the information requires some expertise, such as the identification of the odor of marijuana, the basis of the informant's knowledge must be demonstrated.

State v. Boyer, ___ Wn. App. ___, ___ 102 P.3d 833, 840 (2004) (affidavit failed to establish citizen informant's expertise in identifying cocaine); *see* 2 LaFave, *supra*, § 3.4(b), at 240–248.

2.6(b) Satisfying the "Veracity" Prong by Partial Corroboration of Informant's Tip and by Self-Verifying Detail

Washington courts require a showing of reliability for citizen informants. *Gaddy*, 152 Wn.2d at 72–73; *State v. Ibarra*, 61 Wn. App. 695, 698–99, 812 P.2d 114, 117 (1991) (noting the different types of informants). However, the burden for establishing an identified citizen informant's credibility is generally a reduced standard and the court will presume their reliability. *Gaddy*, 152 Wn.2d at 72–73; *Ibarra*, 61 Wn. App. at 699; *State v. Franklin*, 49 Wn. App. 106, 109, 741 P.2d 83, 85 (1987) (noting that the standard is relaxed but the information must support an inference of truthfulness and must establish a basis of knowledge). The standard is generally not relaxed, however, when the citizen informant remains unidentified to the magistrate. *Huft*, 106 Wn.2d at 211; *Ibarra*, 61 Wn. App. at 699.

Police must present the issuing magistrate with sufficient facts to determine either the informant's inherent credibility or reliability, unless the police corroborate the informant's tip. *Duncan*, 81 Wn. App. at 76; *State v. Huff*, 33 Wn. App. 304, 307–08, 654 P.2d 1211, 1213 (1982). Naming an informant is not a sufficient ground upon which to credit an informer; however, independent police corroboration of criminal activity along the lines suggested by the informant may suffice. *Jackson*, 102 Wn.2d at 438; *Duncan*, 81 Wn. App. at 77. Corroboration must suggest criminal activity, not just innocuous facts. *State v. Young*, 123 Wn.2d 173, 195–96, 867 P.2d 593, 603 (1994) (en banc); *State v. Rakovsky*, 79 Wn. App. 229, 239, 901 P.2d 364, 370 (1995) (absent information on marijuana growing, no reasonable inference of criminal activity). The corroborating information must point to suspicious activities along the lines suggested by the informant. *State v. Maxwell*, 114 Wn.2d 761, 769, 791 P.2d 223, 227 (1990) (en banc).

2.6(c) Sufficiency of Information Supplied

Factors that have been considered in determining whether sufficient information has been provided by a victim informant or witness informant include: (1) the particularity of the description of the offender or the vehicle; (2) the size of the area in which the perpetrator might be found; (3) the number of persons in the area; (4) the direction of flight; (5) the activity or condition of the person arrested; and (6) the person's

knowledge that his vehicle has been involved in other similar criminal activity. *See* 2 LaFave, *supra*, § 3.4(c), at 248–69.

When a citizen can identify a suspect by name or by photograph, the information is sufficient to establish probable cause. *See Simmons v. United States*, 390 U.S. 377, 384, 88 S. Ct. 967, 971, 19 L. Ed. 2d 1247, 1253 (1968). The use of photo identification, however, is subject to challenge on certain deficiencies. *Id.* at 383–84, 88 S. Ct. at 971, 19 L. Ed. 2d at 1253 (initial photo misidentification may reduce the trustworthiness of a subsequent lineup or courtroom identification because the witness may retain a memory of the photo and not their own personal observation).

Washington cases discussing particular fact patterns include the following: *State v. Palmer*, 73 Wn.2d 462, 464–65, 438 P.2d 876, 878 (1968) (finding probable cause for arrest 45 minutes after robbery victim identified automobile by make, year, color, and dirty white top, and described suspect by hair color and attire); *State v. Kohler*, 70 Wn.2d 599, 605, 424 P.2d 656, 660 (1967) (finding probable cause when two witnesses provided police with descriptions of vehicle, clothing, and build of suspects, and when probability was slight that two similar cars would be traveling within limited area of Seattle at 12:30 a.m.); *State v. Baker*, 68 Wn.2d 517, 520, 413 P.2d 965, 967–68 (1966) (finding probable cause when robbery victims identified make, color, and license number of suspect vehicle).

2.7 POLICE AS INFORMANTS

2.7(a) Satisfying the "Veracity" and "Basis of Knowledge" Prongs

As with citizen informants under federal law, the veracity of police informants' statements may be presumed. *See United States v. Ventresca*, 380 U.S. 102, 110, 85 S. Ct. 741, 747, 13 L. Ed. 2d 684, 690 (1965); *State v. Gaddy*, 152 Wn.2d 64, 71–73, 93 P.3d 872, 876 (2004) (en banc).

Generally, there must be a showing that the officer had a basis for his or her knowledge. *Gaddy*, 152 Wn.2d at 72. In limited, complex situations, when explaining the grounds for the belief may be difficult, conclusory allegations will be sufficient. *Jaben v. United States*, 381 U.S. 214, 224–25, 85 S. Ct. 1365, 1370, 14 L. Ed. 2d 345, 352 (1965) (in tax evasion case, affidavit need not explain every basis of the allegation).

2.7(b) Multiple Hearsay

An arresting officer need not have personal knowledge of the facts establishing probable cause, but may rely on another officer's assess-

ment. *Whiteley v. Warden*, 401 U.S. 560, 568, 91 S. Ct. 1031, 1037, 28 L. Ed. 2d 306, 313 (1971) ("fellow officer rule"); *Gaddy*, 152 Wn.2d at 70–71 (officer may rely on information from a police bulletin or "hot sheet" if the issuing agency has probable cause). However, probable cause must actually exist for the arrest to be valid. *Whiteley*, 401 U.S. at 568–69, 91 S. Ct. at 1037–38, 28 L. Ed. 2d at 313–14; *Gaddy*, 152 Wn.2d at 70–71. *See* 2 Wayne R. LaFave, *Search and Seizure* § 3.5(b), at 273–285 (4th ed. 2004). Good faith reliance by the arresting officer is irrelevant. *State v. Gaddy*, 114 Wn. App. 702, 706, 60 P.3d 116, 119 (2002), *aff'd*, 152 Wn.2d 64, 93 P.3d 872 (2004).

Although determining probable cause on the basis of collective information in an agency is generally permissible, the chain of communication must be shown. *See, e.g.*, *State v. Johnson*, 12 Wn. App. 309, 310, 529 P.2d 873, 874 (1974). *See generally* 2 LaFave, *supra*, § 3.5(c), at 285–291. Whether the State must prove the reliability of the agency's records may depend on whether the court considers the agency to be a citizen informant. *Compare State v. Gaddy*, 152 Wn.2d 64, 71–74, 93 P.3d 872, 876–77 (2004) (en banc) (treating Department of Licensing as a citizen informant and finding Department's information presumptively reliable regarding defendant's driving record) *with State v. Sandholm*, 96 Wn. App. 846, 848, 980 P.2d 1292, 1293 (1999) (no evidence provided to show reliability of information from WACIC radio).

2.8 Information from Anonymous or Unknown Informants: Satisfying the "Veracity" Prong

Generally, an anonymous informant's tip fails to meet the *Aguilar-Spinelli* requirements of basis of knowledge and veracity unless the tip is corroborated. *Spinelli v. United States*, 393 U.S. 410, 413, 89 S. Ct.. 584, 587, 21 L.Ed. 2d 637, 641–42 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct.. 1509, 1514, 12 L.Ed. 2d 723, 729 (1964); *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593, 604 (1994) (en banc); *cf. State v. Murray*, 110 Wn.2d 706, 712, 757 P.2d 487, 489 (1988) (en banc) (basis of knowledge prong satisfied from informant's personal observations even though police did not corroborate those observations). A named but unknown informant is not presumed reliable. *See State v. Sieler*, 95 Wn.2d 43, 48, 621 P.2d 1272, 1275 (1980) (en banc) (reliability of named but unknown telephone informant not significantly different from anonymous telephone informant). If, however, a police investigation corroborates the informant's information and constitutes more than public or innocuous facts, the *Aguilar-Spinelli* test may be satisfied. *Young*, 123 Wn.2d at 195; *State v. Jackson*, 102 Wn.2d 432, 438, 688 P.2d 136, 140 (1984) (en banc).

2.9 SPECIAL SEARCHES AND SEIZURES REQUIRING LESSER OR GREATER LEVELS OF PROOF

Administrative searches may require a lesser level of proof than probable cause and are discussed in section 2.9(a). *Terry* investigatory stops require less than probable cause and are covered in section 2.9(b). Searches that intrude into an individual's body, on the other hand, require a greater level of proof and are discussed in section 2.9(c).

2.9(a) Administrative Searches

The protections of the Fourth Amendment and Article I, Section 7 of the Washington Constitution extend to administrative and regulatory searches. *Camara v. Municipal Court*, 387 U.S. 523, 523–32, 87 S. Ct. 1727, 1727–33, 18 L. Ed. 2d 930, 930–38 (1967). Therefore, such searches must either be conducted pursuant to a warrant or fall within one of the narrowly drawn exceptions to the warrant requirement. *Id.*; *Ferguson v. City of Charleston*, 532 U.S. 67, 84, 121 S. Ct. 1281, 1292, 149 L. Ed. 2d 205 (2001) (explaining that the "special needs" doctrine upholds certain suspicionless searches performed for reasons unrelated to law enforcement and finding a Fourth Amendment violation where extensive involvement of law enforcement and threat of prosecution were essential to hospital program's success in forcing prenatal patients into drug treatment); *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 183, 931 P.2d 208, 215 (1997). Administrative searches conducted pursuant to an exception to the warrant requirement must be reasonable in light of the individual's expectation of privacy and the asserted government interest. *Murphy v. State*, 115 Wn. App. 297, 306–07, 62 P.3d 533, 538 (2003) (Washington statute authorized a warrantless survey of a patient's prescription information when government's statutorily mandated interest in monitoring the flow of drugs from pharmacies to patients outweighed a patient's limited expectation of privacy).

Probable cause must exist for warrants issued for health and safety inspections. *City of Seattle v. McCready*, 123 Wn.2d 260, 280, 868 P.2d 134, 144–45 (1994) (*McCready I*) (en banc); *Thurston County Rental Owners Ass'n*, 85 Wn. App. at 183. If voluntary consent is given, a warrant is not required, and therefore, probable cause is not required. *City of Seattle v. McCready*, 131 Wn.2d 266, 272–73, 931 P.2d 156, 159–60 (1997) (McCready III) (en banc); *City of Seattle v. McCready*, 124 Wn.2d 300, 303–04, 877 P.2d 686, 688 (1994) (McCready II) (en banc); *Thurston County Rental Owners Ass'n*, 85 Wn. App. at 183; *State v. Browning*, 67 Wn. App. 93, 96, 834 P.2d 84, 85 (1992) (building inspec-

tor's entry into apartment without consent of occupant was unlawful because statute required consent of the occupant).

A municipal court may not issue an administrative warrant for inspection of a civil infraction, even if the infraction is supported by probable cause; the authority extends only for criminal violations. *McCready II*, 124 Wn.2d at 309 (administrative warrant held invalid when it was issued for the violation of the housing code but there was no allegation that the violation constituted a crime). This is because no statutory or rule-based authority exists that allows municipal courts to issue warrants for suspected civil infractions. *McCready I*, 123 Wn.2d at 273–74. *See generally State v. Lansden*, 144 Wn.2d 654, 663, 30 P.3d 483, 487 (2001) (en banc) (observing that courts of limited jurisdiction have no inherent authority to issue administrative search warrants but must rely on an authorizing court's rules or statutes).

Inventory searches can also be justified without probable cause. *Colorado v. Bertine*, 479 U.S. 367, 374, 107 S. Ct. 738, 741–42, 93 L. Ed. 2d 739, 745 (1987) (inventory search of car after drunk driving arrest); *State v. White*, 135 Wn.2d 761, 766, 958 P.2d 982, 984 (1998) (inventory searches pursuant to standard police procedures are "reasonable"). The inventory search must be made pursuant to reasonable regulations. *Florida v. Wells*, 495 U.S. 1, 3–4, 110 S. Ct. 1632, 1635, 109 L. Ed. 2d 1, 6 (1990) (opening of locked container during inventory search held unconstitutional because there were no regulations to give police discretion to open containers); *White*, 135 Wn.2d at 765–66 (inventory searches pursuant to standard police procedures are reasonable but may not be unlimited in scope and must be limited to those areas necessary to fulfill its purpose). Washington, however, provides greater protection against inventory searches. *Id.* at 768–69.

For a discussion of administrative searches in general, *see infra* § 6.4.

2.9(b) Terry *Stops and Frisks*

Police may stop an individual for investigation with less than probable cause if they have reasonable and articulable facts that point toward criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); *State v. Rankin*, 151 Wn.2d 689, 698–99, 92 P.3d 202, 207 (2004) (en banc) (police may not request identification from a passenger for investigatory purposes without an articulable suspicion of criminal activity by the passenger); *State v. Kennedy*, 107 Wn.2d 1, 8, 726 P.2d 445, 449 (1986) (en banc) (reasonable suspicion of drug deal justified by officer receiving two reliable tips of purported drug deals, by officer's experience with drug investigations, and by officer's

own corroboration of some of the information); *State v. Bailey*, 109 Wn. App. 1, 4, 34 P.3d 239, 240 (2001) (reasonable suspicion of liquor violation justified by defendant's sitting on the ground in a public area with liquor bottles nearby, including one that still contained liquor); *State v. Coyne*, 99 Wn. App. 566, 574, 995 P.2d 78, 83 (2000) ("suspicious" story insufficient to justify reasonable articulable suspicion after reason for initial police contact was eliminated); *State v. Mitchell*, 80 Wn. App. 143, 147, 906 P.2d 1013, 1016 (1995) (reasonable suspicion established from defendant openly carrying a semi-automatic weapon while walking in an urban residential neighborhood); *State v. Walker*, 66 Wn. App. 622, 626, 834 P.2d 41, 44 (1992) (no reasonable suspicion based on defendant being startled when he saw the officer and attempting to avoid contact with the officer); *State v. Pressley*, 64 Wn. App. 591, 595, 825 P.2d 749, 751 (1992) (two women on street corner acted suspiciously by hiding a package and expressing surprise when police approached); *State v. DeArman*, 54 Wn. App. 621, 625, 774 P.2d 1247, 1249 (1989) (no reasonable suspicion when defendant remained motionless at a stop sign for 45 to 60 seconds and started to move away when the officer approached).

An investigatory stop requires a lower standard than probable cause: reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 123–24, 120 S. Ct. 673, 675–76, 145 L. Ed. 2d 570 (2000). As a result, a lesser showing as to an informant's veracity, reliability, and basis of knowledge is required to meet the reasonable suspicion standard. *Alabama v. White*, 496 U.S. 325, 330, 1108 S. Ct. 2412, 2416, 110 L. Ed. 2d 301, 309 (1990). However, an investigative stop is not justified if there is no independent basis to rely on an anonymous informant's tip. *Kennedy*, 107 Wn.2d at 7; *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272, 1274–75 (1980) (en banc); *State v. Vandover*, 63 Wn. App. 754, 822 P.2d 784 (1992). "'Indicia of reliability' requires: (1) knowledge that the source of the information is reliable, and (2) a sufficient factual basis for the informant's tip or corroboration by independent police observation." *State v. Jones*, 85 Wn. App. 797, 799–800, 934 P.2d 1224, 1226 (1997) (hand signal from unknown informant is not sufficient indicia of reliability).

A state may make it a crime for a suspect to refuse to identify herself during an investigative stop if the request for identification is reasonably related to the circumstances that justified the stop. *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humboldt County*, ___ U.S. ___, ___, 124 S. Ct. 2451, 2459–60, 159 L. Ed. 2d 292 (2004). *But cf. Rankin*, 151 Wn.2d at 698–99 (police may not request identification from a vehicle passenger for investigatory purposes without an articulable suspicion of criminal activity by the passenger).

Officers are also allowed to search and temporarily seize persons and property when necessary to protect officer safety. *State v. Rehn*, 117 Wn. App. 142, 152, 69 P.3d 379, 382–83 (2003) (officer's articulable concern about presence of firearms in vehicle justified exertion of some control over the vehicle's passengers to alleviate that concern); *State v. King*, 89 Wn. App. 612, 618–19, 949 P.2d 856, 860–61 (1998) (allowing temporary seizure of person who was in the apartment with a gun during a consent search); *State v. Cotten*, 75 Wn. App. 669, 683, 879 P.2d 971, 980 (1994) (officers conducting a consensual search of a house may briefly seize dangerous weapons or instrumentalities in order to protect themselves while conducting the search).

A valid *Terry* stop may include a search of the interior of a suspect's car when necessary to guarantee officer safety. *Kennedy*, 107 Wn.2d at 12; *State v. Larson*, 88 Wn. App. 849, 856–57, 946 P.2d 1212, 1216 (1997) (officer may conduct a protective search of the interior of a car when the driver returns to the vehicle for the registration). *But see State v. Henry*, 80 Wn. App. 544, 553, 910 P.2d 1290, 1294 (1995) (officer may not convert a routine traffic stop into a more intrusive detention without an objective basis to do so). Similarly, frisking a suspect for weapons is justified if the officer has reasonable grounds to believe the person is armed and currently dangerous. *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884, 20 L. Ed. 2d at 910–11; *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160, 164 (1994) (en banc); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429, 431 (1980) (en banc). *But cf. State v. Reyes*, 98 Wn. App. 923, 932, 993 P.2d 921, 926 (2000) (officer's search exceeded scope permitted under *Terry* when officer admitted to looking for both weapons and narcotics).

2.9(c) Intrusions into the Body

Under Article I, Section 7 of the Washington Constitution, taking a blood sample is a search and seizure that must be supported by probable cause. *State v. Judge*, 100 Wn.2d 706, 711–12, 675 P.2d 219, 222–23 (1984) (en banc); *State v. Baldwin*, 109 Wn. App. 516, 523–24, 37 P.3d 1220, 1224–25 (2001) (reasonable grounds existed to conduct blood test when driver passed breath test but showed obvious signs of impairment); *State v. Dunivin*, 65 Wn. App. 501, 507, 828 P.2d 1150, 1154 (1992). *See generally* RCW 46.20.308(2) (authorizing warrantless blood test based on reasonable grounds). In one case, the court upheld the seizure of blood when officers believed a defendant who committed vehicular homicide was driving while intoxicated. *Dunivin*, 65 Wn. App. at 507 (authority under RCW 46.20.308(3)); *State v. Rangitsch*, 40 Wn. App. 771, 775, 700 P.2d 382, 385 (1985). If probable cause exists, neither an

adversarial hearing nor notice to defense counsel is required before a search warrant to obtain a blood sample may be issued. *State v. Kalakosky*, 121 Wn.2d 525, 534–36, 852 P.2d 1064, 1069–70 (1993) (en banc) (holding that a search warrant was valid to obtain a blood sample from a suspect who had been arrested but not charged).

The Fourth Amendment allows warrantless searches, including body searches of convicted persons, even without probable cause or individualized suspicion. *State v. Audley*, 77 Wn. App. 897, 904, 894 P.2d 1359, 1363 (1995) (no greater protection under state constitution). But general privacy rights must be protected by requiring "special needs beyond normal law enforcement" for withdrawing blood. *State v. Olivas*, 122 Wn.2d 73, 93, 856 P.2d 1076, 1086 (1993) (en banc) (DNA testing of convicted violent or sex offenders meets special needs requirement).

CHAPTER 3: SEARCH WARRANTS

3.0 INTRODUCTION: FOURTH AMENDMENT REQUIREMENTS FOR SEARCH WARRANTS

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This provision was enacted partly in response to the evils of general warrants in England and writs of assistance in the American colonies. *See Boyd v. United States*, 116 U.S. 616, 626–27, 6 S. Ct. 524, 530, 29 L. Ed. 746, 749–50 (1886); *State v. Fields*, 85 Wn.2d 126, 128, 530 P.2d 284, 285 (1975) (en banc). Such warrants and writs had provided law enforcement officers virtually unlimited discretion to search whenever, wherever, and whomever they chose. In adopting the Fourth Amendment, the Framers sought to curb the abuses that accompanied these unconstrained licenses to search. *See Chimel v. California*, 395 U.S. 752, 760–61, 89 S. Ct. 2034, 2038–39, 23 L. Ed. 2d 685, 692–93 (1969). This chapter focuses on the interpretation of Article I, Section 7 of the Washington Constitution and the Fourth Amendment's requirements for a valid search warrant and its execution.

Searches and seizures must generally be made pursuant to a warrant. *See, e.g., United States v. Ventresca,* 380 U.S. 102, 106, 85 S. Ct. 741, 744, 13 L. Ed. 2d 684, 687 (1965). The basic purpose of the warrant process is to interpose a neutral and detached magistrate between the law enforcement authorities and the individual whose effects are to be searched. Once issued, the warrant also serves to limit the scope of the search to the areas and items specified in the warrant. To be lawful, a warrant must meet the following requirements: (1) It must be issued by a neutral and detached magistrate; (2) the magistrate must determine that there is probable cause to search or arrest and must support this determination by oath or affirmation; and (3) the warrant must describe with particularity the place to be searched and the items or persons to be seized. *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 368–69, 92 L. Ed. 436, 440 (1948); *see also Groh v. Ramirez*, 540 U.S. 551, 560–61, 124 S. Ct. 1284, 1291–92, 157 L. Ed. 2d 1068, 1080–81 (2004).

There are, however, a number of situations in which searches and seizures may be made without warrants—even when it would be feasible to obtain them—and there are some circumstances when warrants alone are insufficient. *See infra* § 3.3(a)–(d). For the most part, the standards

discussed below apply to arrests as well as to search warrants. Issues pertaining specifically to arrests are discussed in Chapter 4.

3.1 TYPES OF ITEMS THAT MAY BE SEARCHED AND SEIZED

Warrants may be issued not only for contraband or instrumentalities of crime, but also for "mere evidence." *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 306–07, 87 S. Ct. 1642, 1650, L. Ed. 2d 782, 792 (1967). When the State seeks a warrant for "mere evidence," it must show probable cause to believe that the evidence will aid in apprehending or convicting the suspect. *Id.* at 307, 87 S. Ct. at 1650, 18 L. Ed. 2d at 792; *see also* Wash. CrR 2.3(b); Wash. CrRLJ. 2.3(b). Warrants may be issued for evidence containing incriminating statements; the Fifth Amendment provides protection only where the act of producing evidence is, itself, testimonial. *See United States v. Hubbell*, 530 U.S. 27, 36, 120 S. Ct. 2037, 2043, 147 L. Ed. 2d 24, 36 (2000). Note, however, that in a concurring opinion authored by Justice Thomas, Justices Thomas and Scalia appear to believe that the Fifth Amendment may offer a broader protection against the production of incriminating evidence generally rather than merely in situations where the act of production can, itself, be deemed testimonial. *Hubbell*, 530 U.S. at 49, 120 S. Ct. at 2050, 147 L. Ed. 2d at 44 (Thomas, J., concurring). Additionally, the Fifth Amendment protects a person from being compelled to act as a witness against him or herself; thus, it provides no protection from the production of evidence by others. *Andresen v. Maryland*, 427 U.S. 463, 473, 96 S. Ct. 2737, 2745, 49 L. Ed. 2d 627, 638 (1976).

3.2 WHO MAY ISSUE WARRANTS: REQUIREMENT OF NEUTRAL AND DETACHED MAGISTRATE

One aspect of the protection provided by a warrant is the determination of probable cause by a neutral and detached magistrate rather than by a police officer. *Johnson v. United States*, 333 U.S. 10, 13–14, 68 S. Ct. 367, 368–69, 92 L. Ed. 436, 440 (1948).

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists of requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13–14, 68 S. Ct. at 369, 92 L. Ed. at 440.

In criminal matters in Washington, a district court's territorial jurisdiction is within the boundaries of the county. RCW 3.66.060. Thus, on probable cause, a district court judge may issue a warrant for the search and seizure of controlled substances outside the court's district, but within the county, without the approval of the prosecutor. RCW 69.50.509; *State v. Uhthoff*, 45 Wn. App. 261, 264, 724 P.2d 1103, 1106 (1986). A district court may issue a warrant relating to the case even after felony information has been filed in superior court. RCW 69.50.509; *State v. Stock*, 44 Wn. App. 467, 475, 722 P.2d 1330, 1335 (1986). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.2(a)–(f) (4th ed. 2004).

3.2(a) Qualifications of a "Magistrate"

Required qualifications of a magistrate are identified in constitutional provisions, statutes, and court rules. The Fourth Amendment does not require that a magistrate be an attorney or a judge so long as he or she is "neutral and detached" and "capable of determining whether probable cause exists for the requested arrest or search." *Shadwick v. Tampa*, 407 U.S. 345, 350, 92 S. Ct. 2119, 2122–23, 32 L. Ed. 2d 783, 788 (1972); *State v. Porter*, 88 Wn.2d 512, 515, 563 P.2d 829, 830–31 (1977) (en banc). *But see* 2 LaFave, *supra*, § 4.2(c), at 492–93 (holding that because search warrants are more complex than arrest warrants, the use of nonlawyers to issue search warrants should be constitutionally suspect).

States may impose more stringent requirements than those required by the Fourth Amendment. For example, Washington limits those empowered to issue warrants to supreme court, court of appeals, superior court, and district court judges, and "all municipal officers authorized to exercise the powers and perform the duties of district judges." RCW 2.20.020(4). Case law has also specifically included court commissioners. *See Porter*, 88 Wn.2d at 514. *But see State v. Walker*, 101 Wn. App. 1, 7–8, 999 P.2d 1296, 1299 (2000) (finding court rule authorizing a "court" to issue a bench warrant did not authorize a court clerk, acting alone, to issue such a warrant); *see also* 2 LaFave, *supra*, § 4.2(c), at 490–93.

Even when the person issuing the warrant is a magistrate in title, he or she must make an independent probable cause determination and may not simply rubber-stamp warrants. *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S. Ct. 1509, 1512, 12 L. Ed. 2d 723, 727 (1964); *State v. Woodall*, 100 Wn.2d 74, 77, 666 P.2d 364, 366 (1983) (en banc).

3.2(b) Neutrality

A magistrate who is capable of determining probable cause may nevertheless be disqualified from issuing a warrant for failing to meet the neutrality requirement. Thus, a state officer who acts as prosecutor or investigator in a case is automatically disqualified from acting as a magistrate in the same case. *Coolidge v. New Hampshire*, 403 U.S. 443, 450, 91 S. Ct. 2022, 2029–30, 29 L. Ed. 2d 564, 573–74 (1971). Similarly, an unsalaried magistrate who receives a fee for each search warrant issued is not considered neutral. *Connally v. Georgia*, 429 U.S. 245, 250, 97 S. Ct. 546, 548, 50 L. Ed. 2d 444, 448 (1977) (having a pecuniary interest in issuing warrants compared with denying them renders a magistrate neither neutral nor detached).

For the same reason, an administrative "warrant" signed by the parole officer conducting a search is invalid. *Hocker v. Woody*, 95 Wn.2d 822, 825–26, 631 P.2d 372, 375 (1981) (en banc). Similarly, the magistrate's involvement in the execution of a warrant may constitute a violation of the neutrality requirement. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326–28, 99 S. Ct. 2319, 2324–25, 60 L. Ed. 2d 920, 928–29 (1979) (finding a judge who accompanied police on a raid of pornographic bookstore was not neutral and detached when he added new materials observed at the store to the previously signed search warrant).

On the other hand, the per se rule of *Coolidge* was held not to apply to a case in which the pro tempore judge issuing the warrant was also a prosecutor, but had not been involved in the prosecution of that particular case. *State v. Hill*, 17 Wn. App. 678, 683, 564 P.2d 841, 843 (1977). A search warrant's issuance has also been upheld when the issuing judicial officer was aware from the affidavit that he might be a witness against the defendant. *State v. Smith*, 16 Wn. App. 425, 427–28, 558 P.2d 265, 267–68 (1976); 2 LaFave, *supra*, § 4.2(b), at 489.

Washington has also refused to apply the *Coolidge* rule of per se disqualification to a judge who issued a search warrant in a case that was before him on special inquiry. *State v. Neslund*, 103 Wn.2d 79, 88, 690 P.2d 1153, 1158–59 (1984) (en banc). In *Neslund*, the judge had been appointed to investigate the suspected criminal activity of the defendant and one of the defendant's brothers. *Id.* at 81. During the special inquiry proceedings, the judge asked another brother some questions; the judge did not, however, question other witnesses, discuss the investigation, or discuss the brother's testimony with anyone else involved in the investigation. *Id.* The *Neslund* court did not per se disqualify the judge from issuing warrants authorizing a search of the defendant's premises and the seizure of particular items of the defendant's personal property; rather, the court based its holding in part on the fact that the warrants were not

issued in subsequent court proceedings "arising" from the inquiry. *Id.* at 82–83; *cf.* RCW § 10.27.180 (special-inquiry judges disqualified from participating in subsequent court proceedings arising from special inquiry).

The question of whether or under what circumstances a prosecuting authority may, in an attempt to obtain a search warrant, present the same evidence to a second magistrate after once being denied has not been squarely addressed in Washington. However, commentators appear to agree that a magistrate's initial probable cause determination is not a final order and that principles of collateral estoppel or res judicata do not preclude the government from presenting the same evidence to a second judicial officer, so long as the government notifies the second officer that the application was previously denied. *See* 2 LaFave, *supra*, § 4.2(e), at 499–500. The presentation of the same evidence to a second magistrate is not tantamount to forum shopping unless the government visits numerous magistrates before convincing one to issue the disputed warrant. *United States v. Savides*, 658 F. Supp. 1399, 1404–05 (N.D. Ill. 1987); *cf. United States v. Davis*, 346 F. Supp. 435, 442 (S.D. Ill. 1972) (condemning magistrate who shopped to obtain a warrant after party has been denied warrant by another magistrate).

3.2(c) Burden of Proof

Unless a magistrate is disqualified under the per se rule of *Coolidge*, the defendant bears the burden of proving a magistrate's lack of neutrality. *See Hill*, 17 Wn. App. at 683.

3.3 CONTENT OF THE WARRANT

3.3(a) Oath or Affirmation; Multiple Affidavits

The oath or affirmation clause of the Fourth Amendment requires that the person presenting the supporting affidavit swear to the information the affidavit contains. U.S. Const. amend. IV. The Washington Supreme Court has upheld a warrant, however, when the affidavit was not sworn to, but was signed in the presence of the magistrate. *State v. Douglas*, 71 Wn.2d 303, 309–10, 428 P.2d 535, 539 (1967). Courts outside of Washington have split on the question of whether a fictitious name affidavit is defective. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.3(f), at 523–24 (4th ed. 2004).

3.3(b) Information Considered

The information establishing probable cause must not be stale at the time it is presented to the judge:

> A delay in executing the warrant may render the magistrate's probable cause determination stale. Common sense is the test for staleness of information in a search warrant affidavit. The information is not stale for purposes of probable cause if the facts and circumstances in the affidavit support a commonsense determination that there is continuing and contemporaneous possession of the property intended to be seized.

State v. Maddox, 152 Wn.2d 499, 505–06, 98 P.3d. 1199, 1202 (2004) (en banc).

In evaluating the staleness of facts underlying a warrant, courts examine the totality of the circumstances; the period of time between the issuance and execution of the warrant is only one factor to be considered in light of all other relevant circumstances including the nature and the scope of the suspected criminal activity. *Id.* "The facts and circumstances recited in the supporting affidavit must establish a reasonable probability that the criminal activity is occurring at or about the time the warrant is issued." *State v. Perez*, 92 Wn. App. 1, 8–9, 963 P.2d 881, 885 (1998). *See also State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192, 1194 (1980) (holding that one sale of a small amount of marijuana did not provide probable cause to search two weeks later). Other relevant factors include the "nature of the criminal, the character of the evidence to be seized, and the nature of the place to be searched." *State v. Hosier*, 124 Wn. App. 696, 715, 103 P.3d 217, 226 (2004).

The fact that a valid warrant could have been obtained had the affiant provided sufficient information to the magistrate will not validate a warrant issued in the absence of that information. *See Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 565 n.8, 91 S. Ct. 1031, 1035 n.8, 28 L. Ed. 2d 306, 311 n.8 (1971). Thus, an otherwise insufficient affidavit cannot be rehabilitated by later production of information that the affiant possessed but did not disclose to the magistrate when seeking the warrant. *Id.* (holding that permitting the record to be expanded with information known to the police, but not disclosed to the magistrate, would "render the warrant requirements of the Fourth Amendment meaningless"); *cf. Seattle v. Leach*, 29 Wn. App. 81, 85, 627 P.2d 159, 162 (1981) (finding affidavit in support of administrative warrant not sufficient when it alleged comprehensive inspection program but failed to describe the program).

On the other hand, the Washington Supreme Court has ruled that when a warrant is facially valid and an omission is neither intentional nor made with a reckless disregard for the truth, the warrant can be valid even though it is based on an affidavit containing an omission. *See State v. Cord*, 103 Wn.2d 361, 368–69, 693 P.2d 81, 85–86 (1985) (en banc). In *Cord*, the court held that although an affidavit in support of a search warrant failed to state the altitude at which the officer allegedly observed marijuana plants, the affidavit otherwise provided a sufficient basis for the issuing judge to conclude that a crime had probably been committed. *Id.* at 366. *But see id.* at 371 (Williams, C.J., dissenting) (arguing that when aerial views are the means utilized to show probable cause, the affidavit must reveal the altitude from which the identification was made so that courts can guard against the issuance of warrants following unreasonably low, intrusive searches and so that courts make sure officers do not engage in unreasonably high views of questionable reliability).

An affidavit must set forth the underlying facts; conclusory information sworn to by the prosecutor is not enough to establish probable cause. *See Albrecht v. United States*, 273 U.S. 1, 5, 47 S. Ct. 250, 251, 71 L. Ed. 505, 508 (1927); *see also State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582, 588 (1999) (en banc). A prima facie showing of criminal activity is not required, although the affidavit must go beyond mere suspicion or personal belief that evidence of a crime will be found on the premises to be searched. *State v. Yokley*, 139 Wn.2d 581, 594–95, 989 P.2d 512, 519 (1999) (en banc); *State v. Chasengnou*, 43 Wn. App. 379, 385, 717 P.2d 288, 291 (1986) (citing *State v. Rangitsch*, 40 Wn. App. 771, 780, 700 P.2d 382, 388 (1985)); *State v. White*, 44 Wn. App. 215, 218, 720 P.2d 873, 875 (1986). At the same time, however, affidavits for search warrants must be tested in a common-sense manner rather than hypertechnically. *State v. Jackson*, 150 Wn.2d 251, 265, 76 P.3d 217, 225 (2003) (en banc). Generally, an affidavit establishes probable cause to support a search warrant if the affidavit sets forth facts sufficient to allow a reasonable person to conclude both that the defendant is involved in criminal activity and that evidence of the crime can be found at the place to be searched. *See Maddox*, 152 Wn.2d at 509.

Evidence from a prior warrantless search conducted under an exception to general search and seizure rules may be used by the issuing magistrate in determining probable cause. A magistrate may also rely on hearsay statements from a police officer's affidavits. *Chasengnou*, 43 Wn. App. at 384; *see also supra* § 2.7(b).

3.3(c) Oral Testimony and Oral Warrants

In Washington, a search warrant may be based on a single affidavit, on several affidavits, or on oral testimony. Wash. CrR 2.3(c); Wash. CrRLJ 2.3(c). The judge must record a summary of any additional evidence on which the warrant was based. Wash. CrR 2.3(c).

Some states, including Washington, permit oral search warrants in which an affiant makes a sworn telephonic statement to a judge. Wash. CrR 2.3(c); *see State v. Ringer*, 100 Wn.2d 686, 701, 674 P.2d 1240, 1249 (1983) (en banc). However, after the magistrate has taken a sworn telephonic statement, the magistrate must produce a written warrant on which the court's signature must be affixed. *State v. Ettenhofer*, 119 Wn. App. 300, 304–06, 79 P.3d 478, 480–82 (2003). When other means are available to memorialize an affiant's sworn testimony, the State is not allowed to use a reconstruction of the entire telephonic affidavit if no original recording of the statement exists. *State v. Myers*, 117 Wn.2d 332, 338, 815 P.2d 761, 765 (1991) (en banc). See also *State v. Smith*, 87 Wn. App. 254, 257–59, 941 P.2d 691, 692–93 (1997) for a discussion of the types of evidence that may be used to reconstruct a telephonic affidavit. For a discussion of various objections to this procedure, see 2 LaFave, *supra*, § 4.3(c), at 511–15.

3.3(d) Administrative Warrants

An administrative warrant may be based either on specific evidence of an existing violation or on a general inspection program based on reasonable legislative or administrative standards that are derived from neutral sources. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 98 S. Ct. 1816, 1824, 56 L. Ed. 2d 305, 316 (1978); *Leach,* 29 Wn. App. at 84. *See generally infra* § 6.4. However, an administrative warrant issued by a magistrate without authority is no more valid than a warrant signed by a private citizen. *Seattle v. McCready*, 123 Wn.2d 260, 272, 868 P.2d 134, 140 (1994) (en banc) (invalidating a warrant to enforce housing codes issued on less than probable cause); *see also State v. Lansden*, 144 Wn.2d 654, 663, 30 P.3d 483, 487 (2001) (en banc) (observing that courts of limited jurisdiction have no inherent authority to issue administrative search warrants but must rely on authorizing court rules or statutes). A right of entry does not authorize the issuance of search warrants for enforcement purposes unless there is probable cause or a statute authorizing the court to issue warrants on less than probable cause. *McCready*, 123 Wn.2d at 278.

3.4 PARTICULAR DESCRIPTION OF PLACE TO BE SEARCHED

3.4(a) General Considerations

By requiring a particular description of the places to be searched, the Fourth Amendment furthers two purposes: (1) It limits the risk that a search will be conducted in the wrong location, and (2) it helps determine whether probable cause is present. *See Steele v. United States*, 267 U.S. 498, 501–02, 45 S. Ct. 414, 415–16, 69 L. Ed. 757, 759–60 (1925). The description must be such that "the officer with a search warrant can, with reasonable effort[,] ascertain and identify the place intended." *Steele*, 267 U.S. at 503, 45 S. Ct. at 416, 69 L. Ed. at 760; *State v. Bohan*, 72 Wn. App. 335, 339–40, 864 P.2d 26, 27–28 (1993) (inquiring into possibility that incorrect location might be searched); *State v. Smith*, 39 Wn. App. 642, 648–49, 694 P.2d 660, 664 (1984). The Fourth Amendment requirement that the places to be searched be described with particularity serves to prevent general searches and leaves nothing to the discretion of the officers executing the warrant. *See Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 76, 72 L. Ed. 231, 237 (1927); *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611, 614–15 (1992); *State v. Rivera*, 76 Wn. App. 519, 522, 888 P.2d 740, 742 (1995). However, carelessness on the part of the officers executing the warrant will not necessarily render the warrant insufficient. Officers executing a warrant need only use "reasonable effort" to confine their search to the areas delineated in the warrant. *See State v. Cockrell*, 102 Wn.2d 561, 570, 689 P.2d 32, 37 (1984) (en banc) (warrant identified place to be searched but did not list an address; officers attempted to serve warrant on persons outside the described area); *see also State v. Fisher*, 96 Wn.2d 962, 967, 639 P.2d 743, 746–47 (1982) (en banc).

If a warrant is invalid because it fails to specifically describe the place to be searched, a search under the warrant cannot be upheld on the ground that a magistrate made a probable cause determination; however, the evidence seized may sometimes be admissible. *See generally infra* § 7.2. The use of a generic term or general description in a warrant is not a per se violation of the Fourth Amendment if a more specific description is impossible and if probable cause is shown. *Perrone*, 119 Wn.2d at 547; *see also State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365, 1369 (1993) (en banc) (holding that "[w]hen the nature of the underlying offense precludes a descriptive itemization, generic classifications such as lists are acceptable"). Furthermore, if a warrant separately and distinctly describes two targets and it is thereafter determined that probable cause existed for issuance of the warrant as to one target, but not the other, the warrant may be treated as severable and upheld as to the one target. *State*

v. Halverson, 21 Wn. App. 35, 37, 584 P.2d 408, 409 (1978); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.5(c), at 588–92 (4th ed. 2004). On the other hand, the severability doctrine must not be applied when doing so would render the particularity standards of the Fourth Amendment meaningless. *Perrone*, 119 Wn.2d at 556–57 (holding that a warrant authorizing a general search of materials protected by the First Amendment was impermissibly broad and invalid in its entirety).

A court may examine five factors when determining whether invalid portions of a warrant may be severed from valid portions: (1) whether the warrant lawfully authorized entry into the premises; (2) whether the warrant includes at least one particularly described item for which there is probable cause; (3) whether the portion of the warrant that is valid is significant when compared to the warrant as a whole; (4) whether the searching officers found and seized any disputed items while executing the valid part of the warrant; and (5) whether the officers conducted a general search in flagrant disregard of the warrant's scope. *State v. Maddox*, 116 Wn. App. 796, 807–09, 67 P.3d 1135, 1141–42 (2003).

The initial determination of whether a description is adequate is made with reference only to the warrant itself. *See State v. Stenson*, 132 Wn.2d 668, 691–93, 940 P.2d 1239, 1252–54 (1997) (en banc). The affidavit and other incorporated documents may be considered if they are attached to the warrant. *Id.* at 696. A description may appear adequate on its face, but upon execution be found to be ambiguous or to contain errors. *Id.* Whether such a warrant will be deemed sufficient depends on the availability of other information that permits the officer to identify the intended premises with reasonable certainty. *Id.*; *State v. Rood*, 18 Wn. App. 740, 743–44, 573 P.2d 1325, 1327–28 (1977).

Three types of information may be considered in determining a warrant's adequacy: (1) physical descriptions of the premises contained in the warrant or in the attached affidavit; (2) information based on the officer's personal knowledge of the location or its occupants; and (3) the officer's personal observations at the time of execution. *Rood*, 18 Wn. App. at 744–45; *see also Smith*, 39 Wn. App. at 648–49 (finding that search warrant identifying place to be searched as 8415 Carl Road, Sumas, Washington, rather than correct address of 8415 Carl Road, Everson, Washington, was such that police officer could, with reasonable effort, ascertain and identify intended place); *State v. Cohen*, 19 Wn. App. 600, 604, 576 P.2d 933, 936 (1978) (requiring only reasonable particularity). *See generally* 2 LaFave, *supra*, § 4.5(a)–(e). Earlier Washington cases include *State v. Davis*, 165 Wn. 652, 654–55, 5 P.2d 1035, 1036 (1931) (finding warrant sufficient despite incorrect street name because name listed was properly known and no one could have been mis-

led) and *State v. Andrich*, 135 Wn. 609, 612, 238 P. 638, 639 (1925) (holding warrant's error in house number was immaterial when officer knew where accused lived and officer searched the correct house). Finally, clerical or ministerial errors will invalidate a warrant only if prejudice is shown. *State v. Busig*, 119 Wn. App. 381, 388, 81 P.3d 143, 146 (2003); *see also State v. Dodson*, 110 Wn. App. 112, 121, 39 P.3d 324, 330 (2002) (holding that police officer merely corrected clerical error in changing warrant to specify a search for methamphetamine instead of marijuana immediately before executing the warrant where court had determined probable cause to search based on affidavit alleging methamphetamine production and that no prejudice was incurred as a result of the change).

3.4(b) Particular Searches: Places

In urban areas, places are usually identified by a street address. The address is unnecessary, however, if other facts make it clear that a particular place is intended. *State v. Trasvina*, 16 Wn. App. 519, 522–23, 557 P.2d 368, 370 (1976) (finding warrant describing premises as two-story, white-frame house located directly behind particular address sufficient when no evidence presented that more than one house met description or that premises failed to conform to description except for incorrect address); *see also State v. Chisholm*, 7 Wn. App. 279, 283, 499 P.2d 81, 84 (1972) (holding that warrant that failed to specify street location was sufficiently clear when officers could identify premises with reasonable certainty and when reason for failure to specify street was included in affidavit for warrant). Rural areas may be described by a legal description of the property. *See Cohen*, 19 Wn. App. at 603–04.

When a warrant contains errors, the burden is on the party challenging the warrant to show that errors could have resulted in a search of the wrong premises. *Fisher*, 96 Wn.2d at 967; *see also Smith*, 39 Wn. App. at 649 (upholding search where incorrect town was identified in warrant because defendant made no showing that a similar address existed that could have been mistakenly searched or even that a street of the same name existed in the wrongly identified town). The test is not whether an officer could hypothetically or theoretically search the wrong premises, but whether, under the circumstances presented, an officer could reasonably determine the correct premises to be searched. *Bohan*, 72 Wn. App. at 339. If an officer can so determine, the warrant will be valid. *Id.*

Generally, unless there is probable cause to search all living units of a multiple-occupancy building, the description must single out a particular subunit. *People v. Avery*, 173 Colo. 315, 319, 478 P.2d 310 (1970) (en banc). But if the building looks like a single occupancy structure

from the outside and the officers have no reason to know that it is a multiple-unit structure, the warrant is not defective for failing to specify a subunit. *Chisholm*, 7 Wn. App. at 282–83.

Another exception, the "community living unit" rule, will generally apply when several people occupy the entire premises in common, but have separate bedrooms. Under the community living unit rule, a single warrant describing the entire premises is valid and justifies a search of the entire premises. *State v. Alexander*, 41 Wn. App. 152, 156, 704 P.2d 618, 620–21 (1985).

Additional exceptions to the particularity rule are outlined in *United States v. Whitten*, 706 F.2d 1000, 1009 (9th Cir. 1983). A warrant may authorize a search of an entire street address while reciting probable cause as to only a portion of the premises if (1) the premises are occupied in common rather than individually; (2) a multi-unit building is used as a single entity; (3) the defendant is in control of the whole premises; or (4) the entire premises is suspect. *Id.* at 1008; *see also* 2 LaFave, *supra*, § 4.5(b), at 579–87.

A warrant authorizing the search of an apartment may also include the search of a padlocked locker located in a storage room next to the defendant's apartment. *State v. Llamas-Villa*, 67 Wn. App. 448, 453, 836 P.2d 239, 242 (1992). The *Llamas-Villa* court concluded that because the storage locker did not constitute a separate building and was not intentionally excluded from the warrant, the officers did not exceed the scope of the warrant when they searched the locker. *Id.* at 452–53. However, in another situation, the officers' search of "outbuildings" exceeded the scope of a search warrant that authorized the search of a residence and the attached carport, but did not authorize the search of "outbuildings," which included a barn and a garage. *State v. Kelley*, 52 Wn. App. 581, 586, 762 P.2d 20, 23–24 (1988). Probable cause to search a house does not provide probable cause to search outbuildings when the outbuildings are under the control of other persons. *State v. Gebaroff*, 87 Wn. App. 11, 16–17, 939 P.2d 706, 709–10 (1997).

Under a search warrant for a premises, the personal effects of the owner may be searched so long as they are likely repositories for items named in the warrant. *State v. Worth*, 37 Wn. App. 889, 892, 683 P.2d 622, 624 (1984). Such personal effects include articles of clothing left on the floor, even though the clothing does not belong to the owner or resident of the premises. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313, 316 (1994) (en banc).

Although search warrants for vehicles are uncommon because of the many exceptions allowing warrantless searches, see *infra* § 5.21, such warrants are governed by the same principles discussed above. *See*

Cohen, 19 Wn. App. at 604; 2 LaFave, *supra*, § 4.5(d), at 592. A warrant issued to search a defendant's premises includes the defendant's automobile if it is located on the premises. *State v. Huff*, 33 Wn. App. 304, 309–10, 654 P.2d 1211, 1214 (1982) (reasoning that the automobile was defendant's personal property and thus subject to a search under the warrant). However, a warrant to search a house does not include a search of a vehicle that is not within the curtilage—the area contiguous to the occupant's home. *State v. Graham*, 78 Wn. App. 44, 51–52, 896 P.2d 704, 710 (1995). Additionally, when the automobile is neither owned nor under the control of the defendant, such warrantless searches violate the particularity requirement of the Fourth Amendment. *Rivera*, 76 Wn. App. at 525–26; *see also* 2 LaFave, *supra*, § 4.10(c), at 750–52.

3.4(c) Particular Searches: Persons

Search warrants may be issued for persons, as well as for places, if there is probable cause to believe that a specific individual has evidence on his or her person. Wash. CrR 2.3(c); *State v. Rollie M.*, 41 Wn. App. 55, 58–59, 701 P.2d 1123, 1124–25 (1985). When a search warrant is issued for a person, the general rule requiring particularity applies. *State v. Carter*, 79 Wn. App. 154, 161, 901 P.2d 335, 339 (1995) (acknowledging contrary authority in other states but assuming without deciding that "all persons present" warrants may pass muster if facts underlying warrant support necessary nexus between all persons present, the place, and the criminal activity). *State v. Martinez*, 51 Wn. App. 397, 399–400, 753 P.2d 1011, 1012–13 (1988) (holding that a warrant is sufficient if it provides a detailed description of the person to be searched, including the person's place of residence); *State v. Douglas S.*, 42 Wn. App. 138, 140, 709 P.2d 817, 818 (1985) (holding that a warrant is insufficient if it does not have a description of the persons to be searched); *Rollie M.*, 41 Wn. App. at 58–59 (finding insufficient a warrant that authorized search of a person found in general vicinity of a specified place); *see also* 2 LaFave, *supra*, § 4.5(e), at 596–603. Additionally, if officers have a warrant to search a person, they may conduct a strip search of the defendant to procure evidence if such search is conducted in a reasonable manner and place as prescribed by statute. *State v. Colin*, 61 Wn. App. 111, 114–15, 809 P.2d 228, 230 (1991); *see State v. Hampton*, 114 Wn. App. 486, 494–95, 60 P.3d 95, 99 (2002) (holding that strip search pursuant to warrant was conducted in a reasonably private place, without unnecessary touching, by persons of the defendant's gender where defendant was a male, all searching officers were male, and search was conducted in a police van with tinted windows).

For a discussion of when a premises search warrant authorizes the search of persons not named in the warrant, see *infra* § 3.8(a). Generally, when a premises search warrant is executed, police may conduct a warrantless search of a person only if they have individualized probable cause to search that person. *See Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238, 245 (1979); *Rivera*, 76 Wn. App. at 524; *see also infra* § 5.1. Nonetheless, a warrant authorizing the search of all persons present at a location to be searched may be upheld if the warrant establishes a nexus between all persons present, the place, and the criminal activity. *See Carter*, 79 Wn. App. at 161 (assuming without deciding that such warrants may pass muster).

3.5 Particular Description of Things to Be Seized

Because the facts in each case differ greatly, the fact patterns of prior cases generally are not referred to when determining whether a warrant describes the things to be seized with sufficient particularity. *See State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115, 117 (1975) (en banc). Instead, courts look to the purposes of the "particular description" requirement to: (1) prevent general exploratory searches; (2) protect against "seizure of objects on the mistaken assumption that they fall within" the warrant; and (3) ensure that probable cause is present. *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611, 614–15 (1992) (en banc). *See also Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 76, 72 L. Ed. 231, 237 (1927); *State v. Stenson*, 132 Wn.2d 668, 691–92, 940 P.2d 1239, 1252 (1997) (en banc). The degree of specificity required depends on the circumstances and the type of items involved. *State v. Hosier*, 124 Wn. App. 696, 711–12, 103 P.3d 217, 224 (2004). A description need not be detailed and is valid if it is "as specific as the circumstances and the nature of the activity, or crime, under investigation permits." *Stenson*, 132 Wn.2d at 692. The warrant must be definite enough to allow the searching officer to identify the objects sought with reasonable certainty. *State v. Nordlund*, 113 Wn. App. 171, 180, 53 P.3d 520, 524 (2002). A search warrant must delineate an officer's actions so that the reviewing court is able to determine that the search was based on probable cause and particular descriptions. *United States v. Gomez-Soto*, 723 F.2d 649, 653 (9th Cir. 1984). *See State v. Chambers*, 88 Wn. App. 640, 644–46, 945 P.2d 1172, 1175–76 (1997) (observing that a lesser degree of precision may be satisfactory where the warrant authorizes a search for contraband or inherently illicit property, and holding warrant authorizing seizure of "any and all controlled substances" adequate for search for marijuana); *Hosier*, 124 Wn. App. at 714 (holding that underwear was "writing material" under search warrant where defendant had,

in the past, written explicit notes on underwear); *State v. Weaver*, 38 Wn. App. 17, 22, 683 P.2d 1136, 1139 (1984) (holding that although cardboard box bearing defendant's name would not generally be considered "paper," police could seize box because the obvious purpose of the warrant was seizure not only of controlled substances, but also of evidence enabling state to demonstrate defendant's dominion and control over the premises); *see also Stenson*, 132 Wn.2d at 693–94 (holding that a warrant was sufficiently particularized because it contained language that limited items to be seized to business, financial, and personal records that indicated a relationship between the parties involved); *State v. Reid*, 38 Wn. App. 203, 212, 687 P.2d 861, 867 (1984) ("[T]he phrase 'any other evidence of homicide' specifically limited the warrant to the crime under investigation [and] specific items listed, such as a shotgun and shotgun shells[,] provided guidelines for the officers conducting the search."); *State v. Lingo*, 32 Wn. App. 638, 641, 649 P.2d 130, 132 (1982) (finding warrant not constitutionally defective when items to be seized are limited). *But see Weaver*, 38 Wn. App. at 24 (Ringold, J., dissenting) (arguing that because the box with defendant's name was not seized to show dominion and control, but solely to carry contraband that had been uncovered during the warrant search, majority's "dominion and control" argument is merely a post hoc attempt to justify seizure, and cocaine later found in the box should have been suppressed). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.6 (a)–(f) (4th ed. 2004).

3.5(a) General Rules

A few general principles can be gleaned from the cases to indicate when a warrant is sufficiently definite to allow the executing officer to identify the property with reasonable certainty:

(1) More ambiguity is tolerated when the police have acquired the most complete description that could reasonably be expected. *See State v. Clark*, 143 Wn.2d 731, 754, 24 P.3d 1006, 1017 (2001) (en banc); *State v. Withers*, 8 Wn. App. 123, 127, 504 P.2d 1151, 1154 (1972).

(2) A more general description will suffice when the precise identity of items sought cannot be determined at the time the warrant is issued and probable cause is shown. *See Perrone*, 119 Wn.2d at 547. However, in such instances, "the search warrant must [also] be circumscribed by reference to the crime under investigation." *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365, 1369 (1993) (en banc) (holding that a warrant functions "not only to limit the executing officer's discretion, but to inform the person subject to the search what items the officer may seize").

(3) A less precise description is adequate for controlled substances. *See State v. Cowles*, 14 Wn. App. 14, 19, 538 P.2d 840, 844 (1975) (holding that when an affidavit states that narcotics and, specifically, marijuana were observed, a search warrant authorizing seizure of "controlled substances" is "reasonable and practical under the circumstances and thus satisfie[s] the constitutional requirement of 'particularity'").

(4) Failure to provide all available descriptive facts is not fatal when the omitted facts could not have assisted the officer in a more circumscribed search. *See State v. Salinas*, 18 Wn. App. 455, 461, 569 P.2d 75, 78 (1977).

(5) An error is not fatal if the officer was able to determine what was intended from the other facts provided in the warrant. *State v. Cohen*, 19 Wn. App. 600, 604, 576 P.2d 933, 936 (1978).

(6) Greater care is required for documents than for physical objects because of the potential for intrusion into personal privacy. *See Stenson*, 132 Wn.2d at 692.

(7) Greater care and particularity is required when property sought is "inherently innocuous" as opposed to property that is "inherently illegal." *See State v. Olson*, 32 Wn. App. 555, 557–58, 648 P.2d 476, 478 (1982).

3.5(b) Circumstances Requiring Greater Scrutiny

Search warrants for documents and for telephone conversations require greater scrutiny because of the potential for intrusion into personal privacy. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 2749 n.11, 49 L. Ed. 2d 627, 643 n.11 (1976). At the same time, the United States Supreme Court has upheld a search warrant that listed specific documents pertaining to a particular crime but then added the catch-all phrase "together with other fruits, instrumentalities, and evidence of crime." *Id.* at 479, 96 S. Ct. at 2748, 49 L. Ed. 2d at 642. In *Andresen*, the search was constitutional because the catch-all phrase was to be read as authorizing a search only for evidence relating to the defined crime. *Id.* at 480–82, 96 S. Ct. at 2748–49, 49 L. Ed. 2d at 642–43; *see also State v. Legas*, 20 Wn. App. 535, 541, 581 P.2d 172, 175 (1978) (citing *Andresen* as authority for the proposition that each item seized need not have been specified in the warrant so long as the item is related to the crime charged); *cf. Reid*, 38 Wn. App. 203, 212, 687 P.2d 861, 867 (1984) (holding that a search warrant sufficiently limited officer's discretion when the warrant described the items to be seized, including "any other evidence of the homicide"). *But see* 2 LaFave, *supra*, § 4.6(d), at 633–34 (suggesting that *Andresen* should not be read as approval for loose descriptions because the Supreme Court was influenced by the fact

that the description was as specific as possible). When a search is for particular contents of documents, the invasion of privacy can be minimized by impounding the documents and then imposing conditions on a further search. *See id.* at 636 n.127.

The particularity requirement is afforded its most exacting enforcement when the items to be seized implicate First Amendment rights, including warrants for books, pictures, films, or recordings. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S. Ct. 1970, 1981, 56 L. Ed. 2d 525, 541 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 511–12, 13 L. Ed. 2d 431, 437 (1965); *Perrone*, 119 Wn.2d at 547 (holding that allegedly obscene publications and films implicate First Amendment protections). In addition, the officers executing the search warrant are constitutionally prohibited from using their own discretion to determine whether materials are unlawful. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325, 99 S. Ct. 2319, 2324, 60 L. Ed. 2d 920, 927–28 (1979). The need to particularize in the warrant the specific papers sought does not apply, however, to papers that merely evidence ownership or control over premises. *Legas*, 20 Wn. App. at 540–41.

Circumstances indicating that an individual has taken precautions to ensure privacy may cause greater court scrutiny. *See, e.g., State v. Butterworth*, 48 Wn. App. 152, 156, 737 P.2d 1297, 1299–1300 (1987). In *Butterworth*, the police located the defendant's residence by requesting his address from the telephone company. *Id.* at 152. The court noted that the listing was unpublished, indicating that the defendant specifically requested privacy regarding his address and phone number. *Id.* Because the defendant had taken precautions regarding his privacy, the police were required to obtain a warrant or subpoena prior to seizing information. *Id.* at 157. The holding in *Butterworth*, however, has not been extended to protect addresses located on the outside of envelopes and postal packages. *See State v. Stanphill*, 53 Wn. App. 623, 627, 769 P.2d 861, 863 (1989); *see also State v. Martin*, 106 Wn. App. 850, 857, 25 P.3d 488, 492 (2001) (holding that no warrant was required for police to search Department of Licensing records to obtain information about registered owners of vehicles).

3.6 EXECUTION OF THE WARRANT: TIME OF EXECUTION

Washington is one of several states whose court rules require warrants to be executed within a certain time period. The warrant "shall command the officer to search, within a specific period of time not to exceed 10 days." Wash. CrR 2.3(c). *See* RCW 69.50.509 (three-day limit for return of a search warrant for controlled substances); *see also State v. Thomas*, 121 Wn.2d 504, 513, 851 P.2d 673, 678 (1993) (en banc) (hold-

ing that search warrant for controlled substances under RCW 69.50.509 must be executed within 10 days and returned within three); *State v. Wallaway*, 72 Wn. App. 407, 415, 865 P.2d 531, 535–36 (1994) (applying the *Thomas* rationale in upholding the timeliness of a search warrant). A delay in execution may render a warrant invalid because it may mean that probable cause no longer exists at the time the warrant is executed. *See State v. Higby*, 26 Wn. App. 457, 460, 613 P.2d 1192, 1194 (1980); *see* 2 Wayne R. LaFave, *Search and Seizure* § 4.7(a), at 645–50 (4th ed. 2004).

Unlike other states, Washington does not restrict the execution of warrants to daytime hours. *See* Wash. CrR 2.3(c) (providing that a warrant may be served at any time of day); *see also State v. Smith*, 15 Wn. App. 716, 719–20, 552 P.2d 1059, 1062 (1976) (nighttime search is not unreasonable). The United States Supreme Court has not decided whether the Fourth Amendment requires additional justification for nighttime search warrants. *But see Gooding v. United States*, 416 U.S. 430, 460, 94 S. Ct. 1780, 1795, 40 L. Ed. 2d 250, 270 (1974) (Douglas, J., dissenting) ("The purpose of the restriction upon nighttime searches was to limit such intrusions to those instances where there is 'some justification for it.'"); *see also* 2 LaFave, *supra*, § 4.7(b), at 655 (submitting that the true test of the constitutionality of a nighttime search depends on whether it was necessary to make the search at that time).

A search warrant may be executed even when the occupants are not present. *See, e.g., United States v. Gervato*, 474 F.2d 40, 44 (3d Cir. 1973) (holding that presence of occupant while search warrant is being executed is neither a common law nor a constitutional requirement); *see also State v. Wraspir*, 20 Wn. App. 626, 628, 581 P.2d 182, 184 (1978); 2 LaFave, *supra*, § 4.7(c), at 656–60.

3.7 Entry Without Notice or by Force: "Knock and Announce" Requirement

Absent exigent circumstances, officers executing a warrant must give notice of their authority and purpose prior to entering the private premises. *See Ker v. California*, 374 U.S. 23, 37–40, 83 S. Ct. 1623, 1632–33, 10 L. Ed. 2d 726, 740–42 (1963). This "knock and announce" or "knock and wait" requirement applies to the execution of both arrest and search warrants. *Id.*; *State v. Alldredge*, 73 Wn. App. 171, 178, 868 P.2d 183, 187 (1994). The United States Supreme Court has held that a "no-knock" entry is permissible where the police have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or would inhibit the effective investigation of the crime by allowing the destruction of evidence.

Richards v. Wisconsin, 520 U.S. 385, 394, 117 S. Ct. 1416, 1421, 137 L. Ed. 2d 615, 624 (1997); *see also United States v. Ramirez*, 523 U.S. 65, 70–73, 118 S. Ct. 991, 997–98, 140 L. Ed. 2d 191, 199–200 (1998) (holding that the *Richards* standard above does not depend on whether property is destroyed as a result of the "no-knock" entry); *United States v. Banks*, 540 U.S. 31, 38, 124 S. Ct. 521, 526, 157 L. Ed. 2d 343, 353 (2003) (holding that although circumstances justifying forcible entry may not exist prior to knock and announce, exigency involving possible destruction of evidence may develop following, and result from, the act of knocking and announcing, justifying a forcible entry after only a brief wait of 15 to 20 seconds). *But see Wilson v. Arkansas*, 514 U.S. 927, 932–34, 115 S. Ct. 1914, 1917–18, 131 L. Ed. 2d 976, 981–82 (1995) (noting that individuals' common law interest in being given an opportunity to comply with the law and to avoid the destruction of property associated with a "no-knock" entry are not inconsequential). See *infra* §§ 5.16–.20 for a discussion of exigent circumstances.

Washington is one of many states that has codified the knock and announce requirement. *See, e.g.*, Idaho Code § 19-4409; Mich. Comp. Laws. Ann. § 780.656. Washington law provides that "[t]o make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other enclosure, if, after notice of his office and purpose, he be refused admittance." RCW 10.31.040. Although the statute expressly refers to arrests, it applies to the execution of search warrants as well. *State v. Young*, 76 Wn.2d 212, 217, 455 P.2d 595, 598 (1969); *State v. Shelly*, 58 Wn. App. 908, 910, 795 P.2d 187, 188 (1990).

The purposes of the knock and announce rule are: (1) to reduce the potential for violence; (2) to prevent the physical destruction of property; and (3) to protect privacy. *See United States v. Bustamante-Gamez*, 488 F.2d 4, 9 (9th Cir. 1973); *State v. Coyle*, 95 Wn.2d 1, 5, 621 P.2d 1256, 1258 (1980) (en banc); *State v. Garcia-Hernandez*, 67 Wn. App. 492, 496, 837 P.2d 624, 627 (1992). Strict compliance with the knock and announce rule is required unless the State can demonstrate either exigent circumstances or futility of compliance. *Coyle*, 95 Wn.2d at 9–10. *But see State v. Richards*, 136 Wn.2d 361, 374, 962 P.2d 118, 125 (1998) (en banc) (approving court of appeal's conclusion that the "knock and wait" rule is a flexible rule that gives way when police officers have a reasonable belief that strict compliance would be futile); *State v. Reid,* 38 Wn. App. 203, 210, 687 P.2d 861, 867 (1984) (holding that entry is in conformity with the knock and announce statute when compliance is substantial).

An officer's actions are judged by a standard of reasonableness, determined both by the purposes supporting the knock and announce rule and by the particular facts and circumstances of the individual case. *See, e.g., Ker*, 374 U.S. at 33, 83 S. Ct. at 1629–30, 10 L. Ed. 2d at 737; *Alldredge*, 73 Wn. App. at 176–77. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.8(a), at 662–64 (4th ed. 2004).

3.7(a) Types of Entry Requiring Notice

The phrase "break open" in the Washington knock and announce statute refers to all nonconsensual entries, not simply to those involving forcible breaking. *See Coyle*, 95 Wn.2d at 5–6 (holding that knock and wait statute was violated when officers grabbed occupant who had opened door just as police were about to knock and announce themselves; officers then entered through open door without alerting other occupants); *State v. Miller*, 7 Wn. App. 414, 419, 499 P.2d 241, 244–45 (1972) (holding that execution of search warrant was unlawful when police entered through partially opened door without knocking or announcing their purpose). A consensual entry, however, is not "breaking open." *State v. Hartnell*, 15 Wn. App. 410, 418, 550 P.2d 63, 69 (1976) (finding that because defendant's wife invited unidentified officer into house, entry was consensual and announcement of purpose was not required).

Notice is required for entry by use of a pass key. *See Ker*, 374 U.S. at 38–41, 83 S. Ct. at 1632–34, 10 L. Ed. 2d at 740–42. Notice is also required for entry through a closed but unlocked door. *Miller*, 7 Wn. App. at 416. Although courts in other jurisdictions are divided on the question of whether passage through an open door requires notice, *State v. Nunez*, 754 A.2d 581, 584–85 (N.J. Super. Ct. App. Div. 2000), Washington courts require notice in such situations, *see Miller*, 7 Wn. App. at 416 (finding that Fourth Amendment and RCW 10.31.040 prohibit an officer executing a search warrant from entering a house without providing notice of office and purpose, even though door through which officer entered was open far enough to permit passage); *see also State v. Talley*, 14 Wn. App. 484, 490–91, 543 P.2d 348, 352–53 (1975) (holding that officer entering dwelling must give notice of his office and purpose even though door to apartment was partially open). However, an officer's failure to knock and announce himself before entering a fenced backyard through an unlocked gate does not violate RCW 10.31.040 when the officer can observe that the backyard is unoccupied, and can therefore establish that there is little risk of violating the purposes of the rule. *State v. Schimpf*, 82 Wn. App. 61, 65, 914 P.2d 1206, 1208 (1996).

The Washington Supreme Court has held that when consent to enter is obtained by deception, it is still effective consent. *State v. Myers*, 102

Wn.2d 548, 552–53, 689 P.2d 38, 41–42 (1984) (en banc), *modified on other grounds by State v. Lively*, 130 Wn.2d 1, 19–21, 921 P.2d 1035, 1045 (1996). Thus, an officer who deceives a suspect into allowing him or her to enter need not announce his office and purpose. In *Myers*, the police had been aware that the doors and windows to the defendant's house were covered by iron bars. *Id.* at 549. They had also been told by an informant that the defendant kept a handgun within reach whenever he opened the door. *Id.* The police prepared a fictitious warrant for the defendant's arrest for a traffic offense, knowing that the defendant had no outstanding traffic violations. *Id. at* 550. Upon being permitted to enter his house to execute the arrest warrant, the police executed the search warrant. *Id.* The court held that even though the officers failed to announce their office and purpose, the occupant of the house had granted "valid permission" for them to enter. *Id.* at 554; *see also Coyle*, 95 Wn.2d at 5.

Courts have reasoned that an occupant's right to privacy is not infringed by the fact that permission to enter was obtained by ruse, because the occupant may not deny entry to police who possess a valid search warrant. *Myers*, 102 Wn.2d at 560 (Dimmick, J., concurring in result) (arguing that execution of search warrants requires case-by-case evaluation of tactics used to reduce violence and to prevent destruction of property, and that prohibiting use of a ruse may result in police having to approach houses massively armed and with weapons drawn or having to destroy building entrances).

Entry by ruse, subterfuge, or deception is not a violation of the knock and announce statute because no "breaking" occurs within the terms of the statute. *State v. Williamson*, 42 Wn. App. 208, 211, 710 P.2d 205, 207 (1985). Such an entry is approved because the interests underlying the statute are well served by an entry gained with permission of the occupant. *Id.*; *see also State v. Hashman*, 46 Wn. App. 211, 216, 729 P.2d 651, 655 (1986) (holding that, where officer used ruse to gain entry in order to obtain probable cause to support a search warrant, police may use ruse to gain entry when they have justifiable and reasonable basis to suspect criminal activity in a residence).

Washington Courts of Appeal cases involving entry by deception include *State v. Ellis*, 21 Wn. App. 123, 129, 584 P.2d 428, 432 (1978) (holding that when officer was unable to gain entry through use of a false name, subsequent forcible entry absent exigent circumstances was unlawful and not in compliance with the knock and wait statute); *State v. Huckaby*, 15 Wn. App. 280, 290, 549 P.2d 35, 41–42 (1976) (finding knock and announce statute inapplicable when undercover officers gained entry into suspect's home with suspect's consent and for apparent

purpose of drug transaction); *cf. Lewis v. United States*, 385 U.S. 206, 209–10, 87 S. Ct. 424, 426–27, 17 L. Ed. 2d 312, 315–16 (1966) (finding entry lawful when undercover officer telephoned suspect and misrepresented his identity in order to gain invitation into suspect's home). *See generally* William D. Bremer, *Annotation, What Constitutes Compliance with Knock-and-Announce Rule in Search of Private Premises—State Cases*, 85 A.L.R.5th 1 (2001). The Washington knock and announce statute requires notice prior to entry through inner as well as outer doors. RCW 10.31.040. *But see* 2 LaFave, *supra*, § 4.8(c), at 678 (federal rule does not require separate notice for different rooms in one house).

3.7(b) Compliance with Requirements

The police must identify themselves as police officers and indicate to the person in apparent control of the premises that they are present to execute a warrant. *State v. Ellis*, 21 Wn. App. 123, 129, 584 P.2d 428, 432 (1978). It is not sufficient to make this announcement simultaneously with a forcible entry. *Id.*; *State v. Lowrie*, 12 Wn. App. 155, 157, 528 P.2d 1010, 1011–12 (1974) ("Announcing your identity as you kick in the door is not compliance with the general [knock and wait] rule."). Police are not required, however, to give a detailed or completely accurate description of their purpose, as long as they comply with the statute. *See Myers*, 102 Wn.2d at 555 (holding that use by police of fictitious arrest warrant to gain entry into defendant's house in order to execute a valid search warrant did not violate knock and announce requirements because officers announced identity and stated that purpose was to execute a warrant); *Reid*, 38 Wn. App. at 210–11 (holding that police substantially complied with knock and announce rule despite the fact that officers announced their presence and purpose only after entering apartment because officers were uncertain as to whether they were entering a single apartment or a common hallway and because they continued to announce their presence and purpose as they moved through the apartment, accomplishing the purposes of the knock and announce rule).

In general, officers, after giving notice, must allow the occupants an opportunity to "refuse admittance" before entering. *Garcia-Hernandez*, 67 Wn. App. at 495. However, officers need not wait until occupants affirmatively deny their entry. *Richards*, 136 Wn.2d at 374 (holding that police officers need not wait for occupant to expressly grant or deny entry where officers act reasonably and waiting would not achieve any purpose of the "knock and wait" rule); *State v. Jones*, 15 Wn. App. 165, 167, 547 P.2d 906, 908 (1976) (finding officers' entry after 10-second wait reasonable considering the nighttime hour and the fact that defendant and

his family were in bed). The holding in *Jones* is questioned by Wayne R. LaFave in 2 LaFave, *supra*, § 4.8(c), at 674–76 n.71.

Denial of admittance may be implied from the occupant's lack of response. *See State v. Schmidt*, 48 Wn. App. 639, 644–45, 740 P.2d 351, 355 (1987). The length of time that officers must wait before using force to enter a residence depends on the circumstances of each case. *Id.* at 644. However, the waiting period ends when the purposes of the knock and announce rule have been fulfilled. *See Richards*, 136 Wn.2d at 374 (holding that knock and wait rule was not violated where officers immediately entered apartment after announcing their identity and purpose and were visible through sliding screen door, because officers acted reasonably and waiting would have served none of the purposes of the knock and wait rule); *Alldredge*, 73 Wn. App. at 177 (holding that the waiting period is over once "the door of the premises is open, attended by an occupant, and the police have announced their identity and purpose while face-to-face with the occupant").

In executing a search warrant, police officers must act reasonably. *See generally Myers*, 102 Wn.2d at 549–57. Whether an officer acted reasonably is "a factual determination to be made primarily by the trial court and depends on the circumstances of each case." *Garcia-Hernandez*, 67 Wn. App. at 496 (finding police acted reasonably when they identified themselves and their purpose before entering without defendant's consent and yelled "police" before entering defendant's bedroom); *State v. Berlin*, 46 Wn. App. 587, 593–94, 731 P.2d 548, 552 (1987) (holding that when defendant's wife answered the officer's knock but failed to open the door after a 30-second wait, officers were justified in opening the door after the wait, entering, and restating their identity and purpose; the fact that the police had been told that the defendant had weapons and a history of violence was not enough to waive compliance with the knock and announce rule, but did "bear upon the reasonableness of the length of time that the police waited after announcing themselves"); *Schmidt*, 48 Wn. App. at 646 (holding that when officers identify themselves and state that they have a search warrant, no express demand to enter is necessary, and that officers' delay of three seconds between the time they knocked and announced and forcibly entered was reasonable because occupants' privacy interest was minimal by virtue of existence of search warrant, there was the possibility that occupants had been alerted to police presence by barking dogs, suspect had a history of gun possession, assault, and resisting arrest, smell of methamphetamine lab alerted officers to possible risk of explosion, and place to be searched was very small shed, meaning knock could have been quickly answered); *State v. Woodall*, 32 Wn. App. 407, 411, 647 P.2d 1051, 1054 (1982)

(holding that "in light of the information concerning the number of people at the party, danger of violence, the concern for destruction of the evidence, and the deputy's testimony that someone inside the clubhouse saw [the officers] long before they reached the door," a three or four-second wait after the officers announced their identity and purpose made the entry reasonable); *State v. Haggerty*, 20 Wn. App. 335, 337–38, 579 P.2d 1031, 1033 (1978) (finding that when officers knocked on door and announced office and purpose, and when door opened after 30-second wait, officers were justified in believing door was opened in response to announcement and did not need to repeat office and purpose); *Lowrie*, 12 Wn. App. at 157 (holding that "[f]ailure to answer a knock at the door within 15 seconds and then merely walking away from door is [an] insufficient" refusal when officers have not announced their identity and purpose nor explicitly demanded entry, even if occupant might have recognized one of the officers).

Additionally, circumstances must reasonably indicate that the occupant has consented to the officer's entry. *See State v. Sturgeon*, 46 Wn. App. 181, 183, 730 P.2d 93, 94 (1986) (holding that the knock and announce statute was violated when the police knocked, the defendant shouted "yeah," and the police entered the apartment). Washington courts have also rejected the contention that officers' failure to wait long enough to permit the occupants a reasonable opportunity to grant or deny admission violates the knock and announce rule. *See State v. Lehman*, 40 Wn. App. 400, 404, 698 P.2d 606, 609 (1985). In *Lehman*, the plain-clothes police officers knocked and a defendant opened the door approximately 12 inches. The officers displayed their badges and advised the defendant that they had a warrant to search the house. *Id.* at 401. One officer looked through the open door and saw two men sitting in the living room. *Id.* at 401–02. Without waiting for the defendant to grant or deny permission to enter, the officers entered the house and conducted the search. *Id.* The *Lehman* court distinguished the case from *Coyle* by noting that, unlike *Coyle*, there had been an announcement by the police. *Id.* at 404. It was not necessary that all occupants be aware of the announcement; hence, the court found sufficient compliance with the knock and announce statute. *Id.* at 405.

The announcement of office and purpose may be made to the person answering the door even when that person is not in possession of the premises. *See State v. Sainz*, 23 Wn. App. 532, 537 n.3, 596 P.2d 1090, 1094 n.3 (1979).

Unnecessary roughness in executing a warrant "does not rise to constitutional magnitude . . . or negate prior compliance with RCW 10.31.040." *Id.* at 538–39.

The fact that an undercover agent is present who could legally seize the evidence does not excuse other officers from knocking and waiting. *See State v. Dugger*, 12 Wn. App. 74, 77, 528 P.2d 274, 276 (1974).

3.7(c) Exceptions

Under the "useless gesture" exception, compliance with the knock and announce rule is excused if the authority and purpose of the police are already known to those within the premises. *See Ker*, 374 U.S. at 55, 83 S. Ct. at 1640, 10 L. Ed. 2d at 750–51 (Brennan, J., dissenting in part); *Coyle*, 95 Wn.2d at 11; *State v. Shelly*, 58 Wn. App. 908, 911, 795 P.2d 187, 188 (1990). Washington has required that officers be "virtually certain" that occupants of a dwelling are aware of the officers' presence. *Coyle*, 95 Wn.2d at 11. *See generally* 2 LaFave, *supra*, § 4.8(f), at 693.

Once the defendant has opened the door and the police officers have identified themselves and their purpose, any grant or denial of entrance by the defendant has been held to be a useless gesture. *See Shelly*, 58 Wn. App. at 911 (holding strict compliance with the waiting period to be a useless gesture when the police, armed with a valid search warrant, could enter the premises regardless of whether defendant granted or denied them permission); *see also Lehman*, 40 Wn. App. at 404.

The useless gesture exception has also been applied by implication to justify a police officer's forcible entry when the officer identified himself, but was unable to state his purpose before the suspect tried to close the door. *State v. Neff*, 10 Wn. App. 713, 717, 519 P.2d 1328, 1330 (1974). Closing a door on an officer not in uniform, under ambiguous circumstances, will not excuse the officer from complying with the knock and announce rule. *State v. Ellis*, 21 Wn. App. 123, 127, 584 P.2d 428, 431 (1978); *see also Coyle*, 95 Wn.2d at 6.

Police need not comply with the knock and announce requirement, but may instead enter immediately and with force when exigent circumstances are present. *Ker*, 374 U.S. at 37–41, 83 S. Ct. at 1632–34, 10 L. Ed. 2d at 740–42; *State v. Young*, 76 Wn.2d 212, 216, 455 P.2d 595, 598 (1969). A police officer's reasonable belief that the items identified in the search warrant will be destroyed or removed constitutes one type of exigent circumstance. The fact that the items could easily be destroyed is insufficient. The police must possess specific information indicating that the items are in actual imminent danger of destruction or removal. *See Young*, 76 Wn.2d at 215–16 (holding that belief of exigent circumstances cannot be based on suspicion or ambiguous acts); *Coleman v. Reilly*, 8 Wn. App. 684, 687, 508 P.2d 1035, 1038 (1973) (holding that "there must be more than mere suspicion on behalf of the police officers that evidence will be destroyed before [the police] are justified in making an

unannounced entry."); *see also State v. Harris*, 12 Wn. App. 481, 492–94, 530 P.2d 646, 653–54 (1975) (finding police justified in not complying strictly with knock and announce requirements when they had reliable information that suspect kept heroin in condoms that he would swallow if confronted by police).

Washington has rejected the blanket rule, favored by some courts, that permits an unannounced entry when the warrant is for easily disposed of items, such as drugs. *State v. Jeter*, 30 Wn. App. 360, 362, 634 P.2d 312, 314 (1981); *see also State v. Edwards*, 20 Wn. App. 648, 652, 581 P.2d 154, 157 (1978). Specific factual situations are discussed in *Dugger*, 12 Wn. App. at 81–82. *See generally* 2 LaFave, *supra*, § 4.8(d).

A police officer's reasonable belief that announcing his or her office and purpose would jeopardize police or public safety is a second type of exigent circumstance. *See Reid*, 38 Wn. App. at 210; *State v. Carson*, 21 Wn. App. 318, 321–22, 584 P.2d 990, 991–92 (1978). A mere good faith concern for safety, however, is not sufficient. Police must know from prior information or from direct observation that the suspect both keeps weapons and has a propensity to use them. *Jeter*, 30 Wn. App. at 363 (finding no exigent circumstances existed when officer had prior knowledge of defendant's possession of gun but not of any propensity for defendant to use it to resist arrest); *see also State v. Allyn*, 40 Wn. App. 27, 31, 696 P.2d 45, 48 (1985) (holding that police were justified in executing a search warrant without complying with the knock and announce rule when they knew from undercover agent that the defendant had several firearms in his dwelling and a strong propensity to use them); *Dugger*, 12 Wn. App. at 83 (holding that good faith concern for officer safety is not sufficient to excuse compliance with knock and announce rule, and that "some credible evidence, such as knowledge that the occupants might possess weapons and be predisposed to respond violently, is required to support a good faith claim of concern for safety"); *People v. Dumas*, 9 Cal. 3d 871, 879, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973) (finding that information that defendant habitually answered door armed with firearm constituted exigent circumstances); 2 LaFave, *supra*, § 4.8(e), at 686–91.

For a discussion of exigent circumstances justifying the absence of a warrant, see *infra* §§ 5.16–.20.

Finally, law enforcement officers need not comply with the notice requirements when covert entry of the premises is the only way to effectively execute the warrant. *Dalia v. United States*, 441 U.S. 238, 247–48, 99 S. Ct. 1682, 1688–89, 60 L. Ed. 2d 177, 186–87 (1979) (finding covert entry onto premises to install listening device authorized by warrant was constitutional, even where entry was not specifically authorized by

warrant); *Myers*, 102 Wn.2d at 553–54 (finding that police were justified in using ruse to gain entry when informant had stated that defendant usually had handgun within reach when answering door, and all doors and windows were covered by bars).

3.8 SEARCH AND DETENTION OF PERSONS ON PREMISES BEING SEARCHED

3.8(a) Search of Persons on Premises Being Searched

Generally, a premises search warrant justifies a search of personal effects of the owner found therein [that] "are plausible repositories for the objects named in the warrant." *State v. Hill*, 123 Wn.2d 641, 643, 870 P.2d 313, 314 (1994); *see also id.* at 647 (holding that the search of sweatpants found on the floor does not constitute an impermissible search of defendant's person, thus overruling *State v. Lee*, 68 Wn. App. 253, 842 P.2d 515 (1992)); *State v. Worth*, 37 Wn. App. 889, 892, 683 P.2d 622, 624 (1984).

A premises search warrant or a warrant to search the person and premises of one occupant does not authorize a search of other occupants or visitors who happen to be on the premises while the search is taking place, nor does it automatically justify a search of personal effects belonging to such other occupants or visitors. *See State v. Galbert*, 70 Wn. App. 721, 727, 855 P.2d 310, 314 (1993) (rejecting "mere presence" of contraband as a justification to search persons who are merely located at the search scene); *State v. Douglas S.*, 42 Wn. App. 138, 140–42, 709 P.2d 817, 818–19 (1985) (finding frisk of a juvenile entering the residence not justified when there were no grounds to believe that the juvenile had dominion and control over the objects specified in the warrant and the father had admitted that the marijuana plants found on the premises were his); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.9(b)–(c), at 704–06 (4th ed. 2004).

In Washington, a guest in a home has automatic standing to challenge a defective search warrant for the premises where (1) the individual was legitimately on the premises where the search occurred, (2) the state intends to use the fruits of the search against the individual, and (3) the individual did not stipulate to facts that establish a lack of a reasonable expectation of privacy as to the premises searched or the items seized. *State v. Magneson*, 107 Wn. App. 221, 225, 26 P.3d 986, 988 (2001) (citing *State v. Williams*, 142 Wn.2d 17, 22, 11 P.3d 714, 717 (2000) (en banc), as dicta supporting the continuing validity of automatic standing in Washington despite abandonment of doctrine at federal level).

Although some states have approved the use of warrants authorizing "search of all persons present," those states limit such use to situations where the evidence tendered to the issuing "magistrate supports the conclusion that it is probable [that] anyone in the described place when the warrant is executed is involved in the criminal activity in such a way as to have evidence [of the criminal activity] on his person." 2 LaFave, *supra*, § 4.5(e), at 601. Washington courts, however, have held that such a rule fails to establish a sufficient nexus between the persons present and the criminal activity: "[I]ndividualized probable cause is a prerequisite to an evidence search of any person on the premises." *State v. Rivera*, 76 Wn. App. 519, 524, 888 P.2d 740, 743 (1995) (citing *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S. Ct. 338, 342, 62 L. Ed. 2d 238, 245 (1979)). *But see State v. Carter*, 79 Wn. App. 154, 160–61, 901 P.2d 335, 339 (1995) (acknowledging *Rivera* and contrary authority in other states but assuming without deciding that "all persons present" warrants may pass muster if the facts underlying warrant support necessary nexus between all persons present, the place, and the criminal activity).

There are several circumstances, however, in which persons on the premises may be searched. First, a warrant may describe a person to be searched. *See supra* § 3.4(c). Because warrants are to be interpreted with common sense, a warrant stating that there is probable cause to believe evidence is concealed on a person allows a search of that person even though the command portion of the warrant mentions only "places and premises." *State v. Williams*, 90 Wn.2d 245, 246, 580 P.2d 635, 635 (1978). Second, a search may be conducted incident to arrest. *State v. Cottrell*, 86 Wn.2d 130, 133, 542 P.2d 771, 773 (1975) (en banc); *see also infra* § 5.1. In *Cottrell*, the warrant authorized a search of the defendant's residence or "person . . . if found thereon." 86 Wn.2d at 131. The court upheld the search of the defendant's person once the officer had probable cause to place the defendant under control because the defendant exited a car parked in front of the residence. *Id.*

When the warrant itself gives no express or implied authorization to search persons on the premises, and the police do not have probable cause to arrest them, officers may nevertheless search such persons in two situations. First, a person not named in the warrant but present on the premises may be searched if the police "have reasonable cause to believe [that the person] has the articles for which the search is instituted upon his person." *State v. Halverson*, 21 Wn. App. 35, 38, 584 P.2d 408, 410 (1978) (citations omitted). "Reasonable cause" requires that the person engage in some type of suspicious activity. *Id.* Thus, in the execution of a search warrant for narcotics, police were justified in searching an occupant's fists when at the time of the officer's entry the occupant was ob-

served kneeling in front of a weighing scale and then rising with his fists clenched. *Id.* at 36–37. Police were not justified in searching an occupant's purse, however, when the occupant gave no evidence of suspicious behavior. *Worth*, 37 Wn. App. at 893; *cf. Carter*, 79 Wn. App. at 162 (finding no probable cause to search defendant during a valid premises search when defendant was asleep and officers testified that they did not believe defendant was armed and dangerous). *See generally* 2 LaFave, *supra*, § 4.9(c).

Courts are divided as to whether persons who enter a place being searched may legally be searched without a warrant if they have no opportunity to conceal any named items. *See* 2 LaFave, *supra*, § 4.9(c), at 707–08. In these situations, the scope of the search of a bystander is limited to that necessary for detecting the items sought. *Id.* Thus, police may not search a person if the search warrant is for a television set. *Id.* at 632 n.30.

Second, police may conduct a limited search for weapons to protect themselves during the execution of the warrant. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 93, 100 S. Ct. 338, 343, 62 L. Ed. 2d 238, 247 (1979); *Worth*, 37 Wn. App. at 893; *Halverson*, 21 Wn. App. at 38; *State v. Galloway*, 14 Wn. App. 200, 202, 540 P.2d 444, 446 (1975). The police must, however, have a reasonable suspicion that the person searched is armed. *Ybarra*, 444 U.S. at 92–94, 100 S. Ct. at 343, 62 L. Ed. 2d at 246–47; *see also State v. Lennon*, 94 Wn. App. 573, 580–81, 976 P.2d 121, 125 (1999) (holding that a frisk of a person who arrives on the scene of a search must be justified by specific and articulable facts that create an objective, reasonable belief that the suspect is armed and dangerous and may not be based on a generalized suspicion that people present during narcotic searches are often armed). Moreover, the search must be limited to ascertaining whether the individual is armed. *State v. Allen*, 93 Wn.2d 170, 172, 606 P.2d 1235, 1236 (1980) (en banc) (holding that an officer conducting a pat-down of an individual who knocked on the door of a residence being searched may not examine the contents of a wallet found on the individual "after satisfying himself that the 'bulge' [wallet] was not a weapon"); *cf. Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884–85, 20 L. Ed. 2d 889, 911 (1968) (holding that police may conduct limited weapons search to protect themselves during lawful investigatory stop). Slightly different considerations may control in search situations, as opposed to *Terry* stops, because the encounter in the search situation is more lengthy than that in a *Terry* stop. *See* 2 LaFave, *supra*, § 4.9(d), at 714–15.

3.8(b) Detention of Persons on Premises Being Searched

A valid search warrant "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595, 69 L. Ed. 2d 340, 351 (1981) (footnotes omitted). The authority to detain exists even if the occupant is initially found outside the home. *State v. Flores-Moreno*, 72 Wn. App. 733, 739, 866 P.2d 648, 652 (1994).

A brief detention is permissible even when the police do not have probable cause to believe that the objects of the search are on the person detained. *Summers*, 452 U.S. at 705, 101 S. Ct. at 2595, 69 L. Ed. 2d at 351. In addition, the police may ascertain whether any individual arriving on the scene might interfere with the search and may determine what business, if any, the individual has at the premises. *Galloway*, 14 Wn. App. at 201 (citing *State v. Howard*, 7 Wn. App. 668, 502 P.2d 1043 (1972)). Such a limited stop, however, is not a license to detain and frisk all persons approaching within 100 feet of the location of the search. *State v. Melin*, 27 Wn. App. 589, 592, 618 P.2d 1324, 1325 (1980).

3.9 PERMISSIBLE SCOPE AND INTENSITY OF SEARCH

Assuming that a search warrant describes the area and items with the requisite particularity, the remaining question is the permissible scope and intensity of the search. "As a general rule search warrants must be strictly construed and their execution must be within the specificity of the warrant." *State v. Cottrell*, 12 Wn. App. 640, 643, 532 P.2d 644, 646 (1975); *see also Wilson v. Layne*, 526 U.S. 603, 611, 119 S. Ct. 1692, 1697–98, 143 L. Ed. 2d 818, 828 (1999) (noting that the Fourth Amendment at least requires that police actions within a home be related to the objectives of the authorized intrusion and holding that home owner's Fourth Amendment rights were infringed when police allowed media reporters to accompany them into the home for purposes unrelated to the search).

Just how intense a search may be is governed by the nature of the items to be seized. Generally, a premises search warrant "justifies a search of personal effects of the owner found therein [that] are plausible repositories for the objects specified in the warrant." *State v. Worth*, 37 Wn. App. 889, 892, 683 P.2d 662, 624 (1984) (citing *State v. White*, 13 Wn. App. 949, 538 P.2d 860 (1975)); *see also State v. Anderson*, 41 Wn. App. 85, 96, 702 P.2d 481, 490 (1985) (holding that a warrant to search for clothing used in a robbery extended to the entire residence where clothing might be found, including the inside of a garbage-can-sized commercial vacuum cleaner). Similarly, a valid search warrant for a de-

fendant's home, trailer, and vehicles is sufficient to obtain a blood test. *State v. Kalakosky*, 121 Wn.2d 525, 532, 852 P.2d 1064, 1068 (1993).

The United States Supreme Court has recognized that officers searching for documents must, out of necessity, examine documents not specifically listed in the warrant. *Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 2749 n.11, 49 L. Ed. 2d 627, 643 n.11 (1976). In the course of such a search, officers may also seize evidence found that is not specifically described in the warrant if "it will aid in a particular apprehension or conviction, or [if it] has a sufficient nexus with the crime under investigation." *State v. Stenson*, 132 Wn.2d 668, 695, 940 P.2d 1239, 1254 (1997) (en banc) (finding that officers did not exceed the scope of the search warrant when they examined and seized documents not specifically listed in the warrant).

Once the purpose of the warrant has been carried out, the authority to search ends. *See State v. Legas*, 20 Wn. App. 535, 541, 581 P.2d 172, 176 (1978) (holding that a warrant permitting a search in a bedroom for papers linking defendant to the premises did not justify a search of a small box after such papers had been discovered).

3.9(a) Area

A search may extend to the entire area covered by the warrant's description. *See generally Cottrell*, 12 Wn. App. at 644. However, police "must execute a search warrant strictly within the bounds set by the warrant." *State v. Kelley*, 52 Wn. App. 581, 585, 762 P.2d 20, 22 (1988). A warrant that authorizes the search of a house but does not mention outbuildings does not include a search of outbuildings not under defendant's control, and vice versa. *Id.* at 585–86 (suppressing evidence located in a barn and garage that were not specified in the warrant); *see also State v. Gebaroff*, 87 Wn. App. 11, 16, 939 P.2d 706, 709 (1997) (holding that although judges looking for probable cause in an affidavit may draw reasonable inferences regarding where evidence may be located, affidavit and warrant application describing drug buy at a mobile home did not give rise to probable cause to search travel trailer located on same property but not under suspect's control). Generally, where it is reasonable for an officer to believe that a storage area is appurtenant to the area covered by a valid search warrant, the officers may search the storage area. *See State v. Boyer,* 124 Wn. App. 593, 602, 102 P.3d 833, 838 (2004). A search of a padlocked locker and a storage room that did not comprise a separate building does not exceed the scope of a warrant to search the premises. *State v. Llamas-Villa*, 67 Wn. App. 448, 452–53, 836 P.2d 239, 241–42 (1992).

Police may enter areas not explicitly named in the warrant when such entry is necessary to execute the warrant. *See, e.g., Dalia v. United States*, 441 U.S. 238, 257, 99 S. Ct. 1682, 1693, 60 L. Ed. 2d 177, 193 (1979) (holding that a warrant explicitly authorizing planting of hidden microphone implicitly authorized covert entry onto premises). Additionally, officers may search for items thrown outside of the premises if such action was provoked by the knowledge of police presence at the premises. *State v. Dearinger*, 73 Wn.2d 563, 567, 439 P.2d 971, 973 (1968) (finding that officers acted within ambit of warrant in seizing a sack and its contents thrown by occupant into the adjoining yard during the search).

It has been suggested that police may enter adjacent areas if they reasonably fear for their safety. *See* 2 Wayne R. LaFave, *Search and Seizure* § 4.10(a), at 738–39 (4th ed. 2004). However, whether Washington courts will so hold remains unclear. In *Boyer*, a Washington court of appeals noted that no Washington court had addressed the issue of a protective sweep incident to the execution of a search warrant. 124 Wn. App. at 602. The court held that given the weight of authority specifically limiting protective sweeps to arrests and execution of arrest warrants, the trial court erred as a matter of law in concluding that a warrantless search of an area not covered by the search warrant in officers' possession was justified as a protective sweep. *Id.* Although the court's holding may be interpreted as prohibiting warrantless protective sweeps incident to the execution of a search warrant, the *Boyer* court's holding seemed to rest, at least in part, on the fact that the "officers articulated no specific facts that would support a prudent officer's belief that the area harbored a dangerous person." *Id.*

3.9(b) Personal Effects

Personal effects found on the premises and belonging to the occupant may be searched if the effects can reasonably be expected to contain the described items. *See, e.g., State v. Hill*, 123 Wn.2d 641, 643, 870 P.2d 313, 314 (1994); *Worth*, 37 Wn. App. at 892. Ordinarily, however, the police may not search effects that they know belong to other occupants. *See Worth*, 37 Wn. App. at 893. *But see State v. Jackson*, 107 Wn. App. 646, 649, 27 P.3d 689, 690 (2001) (holding that police properly searched a jacket where there was confusion over whether it was owned by lawfully arrested driver or non-arrested passenger). Even when a warrant authorizes a search of the entire premises, it does not justify the search of another person residing on the premises who was not mentioned in the affidavit; nor does it justify a search of a purse belonging to

another person if she was holding the purse or in proximity to it. *Worth*, 37 Wn. App. at 893.

In *Worth*, the court rejected a distinction between personal effects worn on or held by the person and those effects nearby the person at the time of the search: "A narrow focus on whether a person is holding or wearing a personal item would tend to undercut the purpose of the Fourth Amendment and leave vulnerable readily recognizable effects, such as [a] purse, which an individual has under [her] control and seeks to preserve as private." *Id.*; *cf. State v. Scott*, 21 Wn. App. 113, 117, 584 P.2d 423, 425 (1978) (holding that a warrant authorizing search of "spa" business records to uncover evidence of prostitution did not permit search of employees' purses for customers' names); 2 LaFave, *supra*, § 4.10(b), at 747–48 (suggesting that the proper test in a case involving visitors is whether police have a reasonable belief that the items described would be concealed in the visitor's belongings). One court has attempted to avoid this problem by holding that one has no privacy interest in items left at another's house. *State v. Biggs*, 16 Wn. App. 221, 224–25, 556 P.2d 247, 249 (1976) (holding that visitor who departed without his jacket no longer had expectation of privacy regarding the jacket and thus jacket could be searched).

An individual has no privacy interest in abandoned personal property. *See State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200, 203 (2001) (en banc). In *Reynolds*, police arrested the driver of a vehicle in which the defendant was a passenger. *Id.* at 284–85. The arresting officer, having previously noticed a coat on the floor of the vehicle, discovered the same coat pushed under the front passenger tire of the car upon returning to the vehicle to speak with the defendant. *Id.* Upon questioning, Reynolds denied ownership of the coat and denied placing it under the vehicle. *Id.* The *Reynolds* court deemed the coat abandoned property and held that authorities needed neither a warrant nor probable cause to retrieve and search abandoned property. *Id.* at 287–88. However, absent a warrant or an exception to the warrant requirement, a search of abandoned property will not be upheld where a defendant can show both unlawful police conduct and a causal nexus between that unlawful conduct and the abandonment of the property. *See State v. Richenbach*, 153 Wn.2d 126, 136–37, 101 P.3d 80, 87 (2004) (en banc) (holding that abandonment occurs when circumstances show that an individual has voluntarily relinquished a reasonable expectation of privacy by discarding property but that a reasonable expectation of privacy is not voluntarily relinquished when property is abandoned as a result of an illegal search or seizure).

Despite the Supreme Court's holding that there is no expectation of privacy in garbage left beyond the curtilage of a home, Washington has recognized a privacy right in one's garbage, requiring a warrant to search such refuse. *Compare California v. Greenwood*, 486 U.S. 35, 40–41, 108 S. Ct. 1625, 1628–29, 100 L. Ed. 2d 30, 36–37 (1988), *with State v. Boland*, 115 Wn.2d 571, 576–77, 800 P.2d 1112, 1115 (1990) (en banc) (rejecting *Greenwood* on state law grounds). *But see State v. Hepton*, 113 Wn. App. 673, 679, 54 P.3d 233, 237 (2002) (holding no reasonable expectation of privacy in garbage bags left in front of neighboring abandoned house). *See also supra* § 1.3(g).

3.9(c) Vehicles

Police who have authority to search a residence for illegal drugs also have authority to search vehicles that are under the control of the defendant and that are located on the premises to be searched. *State v. Claflin*, 38 Wn. App. 847, 853, 690 P.2d 1186, 1191 (1984). *But see* 2 LaFave, *supra*, § 4.10(b), at 749–50. However, police have no authority to search vehicles that are not within the curtilage of the home. *See, e.g., State v. Graham*, 78 Wn. App. 44, 51–52, 896 P.2d 704, 709–10 (1995) (holding that a truck parked next to, and slightly in, a public street where there was no fence or other barrier between the occupant's yard and the street is not within the curtilage of the house); *State v. Pourtes*, 49 Wn. App. 579, 581, 744 P.2d 644, 645 (1987) (holding that the street and the shoulder of the roadway were not within the curtilage of a residence); *State v. Niedergang*, 43 Wn. App. 656, 662, 719 P.2d 576, 579 (1986) (holding that a vehicle is not within the curtilage of a house when it is parked in a space that lawfully could be used by anyone coming to the adjoining house on legitimate business). A trailer that is used as a residence is treated as a residential outbuilding rather than as a vehicle. *Gebaroff*, 87 Wn. App. at 16.

3.10 SEIZURE OF UNNAMED ITEMS: REQUIREMENTS IN GENERAL

Items not listed in the search warrant may be seized when the seizure falls within one of the general exceptions to the warrant requirement. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563, 568 (1996) (en banc) (search incident to arrest); *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280, 283 (1996) (en banc) (open view); *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761, 769 (1991) (en banc) (plain view). For a discussion of search incident to arrest see infra § 5.1. *See generally infra* ch. 5.

The plain view doctrine is an exception to the warrant requirement that applies after police lawfully invade an area where there is a reason-

able expectation of privacy. *Myers*, 117 Wn.2d at 345–46. The plain view doctrine requires that the officers (1) have prior justification for the intrusion, and (2) immediately recognize they have found contraband. *Id.* Traditionally, inadvertent discovery was a third requirement. *State v. Hoggart*, 108 Wn. App. 257, 271 n.32, 30 P.3d 488, 495 (2001). Inadvertent discovery is no longer required under the Fourth Amendment, see *Horton v. California*, 496 U.S. 128, 140, 110 S. Ct. 2301, 2309–10, 110 L. Ed. 2d 112, 125 (1990), and has never been explicitly required under Article I, Section 7 of the Washington Constitution. *State v. Goodin*, 67 Wn. App. 623, 627–28, 838 P.2d 135, 138 (1992).

Under the plain view doctrine, officers have justification for seizing contraband not specified in the warrant if it is found during the course of a valid search and is within the scope of a valid warrant. *Goodin*, 67 Wn. App. at 627; *see also State v. Wright*, 61 Wn. App. 819, 827, 810 P.2d 935, 939 (1991) (holding that a handgun discovered at the crime scene was within the plain view exception). However, officers do not have justification under the plain view doctrine for seizing contraband discovered during a general exploratory search after they have found what they sought under the warrant. *State v. Legas*, 20 Wn. App. 535, 542, 581 P.2d 172, 176 (1978) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S. Ct. 2022, 2038, 29 L. Ed. 2d 564, 583 (1971)) ("Plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.").

The open view doctrine differs from the plain view doctrine in that the open view doctrine applies when officers discover contraband from a nonintrusive vantage point. *State v. Dykstra*, 84 Wn. App. 186, 191–92, 926 P.2d 929, 932 (1996). For example, a residential front porch may be considered a nonintrusive vantage point if it has a "natural access route to the residence and is impliedly open to the public." *Rose*, 128 Wn.2d at 391–92; *see also Myers*, 117 Wn.2d at 345 (holding that contraband was in open view when police officers approached home in daylight by direct access and spoke with occupant from porch and did not "spy" or act secretively); *State v. Seagull*, 95 Wn.2d 898, 905, 632 P.2d 44, 48–49 (1981) (en banc) (holding that slight deviation from the most direct route was not unreasonable intrusion on occupant's privacy). However, officers violate the open view exception when they intrude on the defendant's reasonable expectation of privacy. *State v. Daugherty*, 94 Wn.2d 263, 266–67, 616 P.2d 649, 651 (1980) (en banc) (finding that a violation occurred when officer questioned a suspect outside the residence and a second officer walked around a vehicle in the driveway to look into an obscure garage at the back of the lot).

3.11 DELIVERING WARRANT AND INVENTORY: REQUIREMENTS FOR EXECUTION OF WARRANTS

Statutes or court rules may impose requirements on the execution of warrants beyond those mandated by the federal constitution. Washington court rules provide:

> The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of a least one person other than the officer. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

Wash. CrR 2.3(d).

Although the rule requires that officers conducting a search provide a resident with a copy of the warrant prior to commencing the search, procedural noncompliance does not compel invalidation of an otherwise sufficient warrant or suppression of the fruits of the search absent a showing of prejudice. *State v. Aase*, 121 Wn. App. 558, 567, 89 P.3d 721, 726 (2004) (holding that several minute delay in provision of warrant to defendant resident did not require suppression under either federal or state constitution or Wash. CrR 2.3(d)). The requirement that an inventory be made in the presence of another person is designed to prevent error in the inventory and is satisfied by the presence of another police officer. *State v. Wraspir*, 20 Wn. App. 626, 628, 581 P.2d 182, 184 (1978).

Washington follows the majority rule that defects relating to the return of a search warrant are ministerial and do not compel invalidation of the warrant, absent a showing of prejudice. *State v. Smith*, 15 Wn. App. 716, 719, 552 P.2d 1059, 1062 (1976). *But see* 2 Wayne R. LaFave, *Search and Seizure* § 4.12(c), at 819 (4th ed. 2004) (suggesting that if no return was made, the search should be unconstitutional).

3.12 CHALLENGING THE CONTENT OF AN AFFIDAVIT

3.12(a) Informant's Identity

Although a defendant is generally entitled to examine an affidavit in order to challenge whether the warrant was issued on probable cause, the court may excise portions of the affidavit that identify a confidential or unnamed informant to protect the State's interest in maintaining the confidentiality of such informants. *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667, 682 (1978); *State v. Mathiesen*, 27 Wn. App. 257, 260, 616 P.2d 1255, 1257 (1980); *see* Wash. CrR 4.7(f)(2) (State's insistence on an informant's secrecy is based on the "informant's privilege," recognized by both statute and court rule); *see also* RCW 5.60.060(5) ("A public officer shall not be examined as a witness as to communications made . . . in official confidence, when the public interest would suffer by disclosure."). When the information is secret, however, the defendant lacks access to the very information he or she needs to challenge the veracity of an affidavit. *State v. Casal*, 103 Wn.2d 812, 818, 699 P.2d 1234, 1238 (1985) (en banc). Thus, "fundamental fairness" may require the disclosure of an informant's identity when the informant's potential testimony at trial would be relevant to the determination of the defendant's innocence. *See Casal*, 103 Wn.2d at 815–16 (citing *Roviaro v. United States*, 353 U.S. 53, 61, 77 S. Ct. 623, 628, 1 L. Ed. 2d 639, 645 (1957)). A defendant under these circumstances is entitled to an in camera hearing on the truthfulness of the informant's information if the defendant "casts a reasonable doubt on the veracity of material representations made by the affiant." *State v. White*, 50 Wn. App. 858, 865, 751 P.2d 1202, 1206 (1988) (quoting *Casal*, 103 Wn.2d at 820). All the defendant must show is a "minimal showing of inconsistency." *White*, 50 Wn. App. at 865 (quoting *United States v. Brian*, 507 F. Supp. 761, 766 (D. R.I. 1981)). Even so, "a *Casal* hearing is required only whe[n] a search warrant affidavit contains no other independent basis for establishing probable cause." *White*, 50 Wn. App. at 865 n.4.

When the defendant presents evidence that casts doubt on the veracity of representations in the officer's affidavit and the officer has related information provided by a secret informant, the court, in its discretion, may order an in camera hearing to examine the informant. *Casal*, 103 Wn.2d at 820–21. If the informant verifies the affiant's story and the judge is convinced that probable cause existed, the informant's identity is not to be disclosed. *Id.* at 822. But if the judge finds a substantial showing of falsehood, an open evidentiary hearing is required. *Id.*

3.12(b) Misrepresentations and Omissions in Affidavit

A defendant may challenge the validity of a warrant based on a misrepresentation of fact in the supporting affidavit. *Franks*, 438 U.S. at 155–56, 98 S. Ct. at 2676, 57 L. Ed. 2d at 672. The defendant must first make a substantial showing that a false statement in the affidavit (1) was either made knowingly and intentionally or in reckless disregard for the truth, and (2) was necessary or material to the finding of probable cause. *Id.* at 155–56, 98 S. Ct. at 2676, 57 L. Ed. 2d at 668–69; *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388, 1389–90 (1992) (per curiam). The *Franks* test also applies to allegations of material omissions. *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81, 85 (1985) (en banc). The substantial showing must be based on specific facts and offers of proof rather than on conclusory assertions. *Garrison*, 118 Wn.2d at 872. "'Allegations of negligence or innocent mistake are insufficient.'" *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44, 50 (1981) (quoting *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684, 57 L. Ed. 2d at 682); *State v. Olson*, 74 Wn. App. 126, 131–32, 872 P.2d 64, 68 (1994); *State v. Taylor*, 74 Wn. App. 111, 116, 872 P.2d 53, 56 (1994).

If the defendant fails to meet these formidable preconditions, the inquiry ends. *State v. Jackson*, 111 Wn. App. 660, 677, 46 P.3d 257, 266–67 (2002). But if the defendant is successful in proving the truth of his allegations and the false statements or omitted material is relevant to the establishment of probable cause, the affidavit must be examined. *Franks*, 438 U.S. at 171–72, 98 S. Ct. at 2684–85, 57 L. Ed. 2d at 682; *Garrison*, 118 Wn.2d at 873. Once false statements are deleted or the omissions are inserted into the affidavit, the defendant's motion to suppress fails and no hearing is required if the affidavit then supports a finding of probable cause. *Garrison*, 118 Wn.2d at 873. However, if the modified affidavit is insufficient to support a finding of probable cause, the defendant is entitled to an evidentiary hearing under the Fourth Amendment. *Franks*, 438 U.S. at 171–72, 98 S. Ct. at 2684–85, 57 L. Ed. 2d at 682; *Garrison*, 118 Wn.2d at 873.

3.13 SPECIAL SITUATIONS

3.13(a) First Amendment Limitations

The Fourth Amendment requirement of particularity in the description of items to be seized is afforded its most scrupulous enforcement when the items implicate First Amendment rights, such as in the case of literature, pictures, films, and recordings. *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 511, 13 L. Ed. 2d 431, 437 (1965); *State v. Per-*

rone, 119 Wn.2d 538, 547–48, 834 P.2d 611, 616 (1992). Furthermore, "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas [that] they contain." *Stanford*, 379 U.S. at 485, 85 S. Ct. at 511–12, 13 L. Ed. 2d at 437; *State v. J-R Distrib., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281, 286 (1988) (en banc). When the First Amendment is involved, nothing should be left to the discretion of the officer executing the warrant. *Stanford*, 379 U.S. at 485, 85 S. Ct. at 512, 13 L. Ed. 2d at 437.

Thus, a warrant that commands the executing officer to seize "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas," fails the scrupulous exactitude requirement of the Fourth Amendment. *Stanford*, 379 U.S. at 478, 85 S. Ct. at 508, 13 L. Ed. 2d at 433 (holding that a general search for objectionable publications was constitutionally intolerable).

However, the scrupulous exactitude standard has not been extended to all searches and seizures involving the First Amendment. *State v. Walter*, 66 Wn. App. 862, 869, 833 P.2d 440, 444 (1992) (per curiam) (determining that greater scrutiny was not required merely because photographs were involved); *see also New York v. P.J. Video, Inc.*, 475 U.S. 868, 875, 106 S. Ct. 1610, 1615, 89 L. Ed. 2d 871, 880 (1986) (rejecting contention that more than warrant was required to seize photographs from newspaper office); *Heller v. New York*, 413 U.S. 483, 490, 93 S. Ct. 2789, 2793, 37 L. Ed. 2d 745, 752–53 (1973) (holding that the First Amendment does not require a hearing prior to seizure of a film so long as the seizure does not prevent the film from being exhibited).

The scrupulous exactitude standard is typically triggered when the warrant commands the seizure of allegedly obscene material. *See Perrone*, 119 Wn.2d at 553; *see also Furfaro v. Seattle*, 97 Wn. App. 537, 984 P.2d 1055 (1999) (holding that, because topless entertainment is entitled to some degree of constitutional protection under the First Amendment, the determination of probable cause to arrest stage dancers is like the determination of probable cause to seize books and films, thus calling for sensitive discernment and a warrant prior to arresting such entertainers under non-exigent circumstances); *see also* 2 Wayne R. LaFave, *Search and Seizure* § 4.6(e), at 638–41 (4th ed. 2004). Clearly, a warrant authorizing the seizure of material that the executing officer deems to be "child pornography" provides the executing officer broad discretion and therefore violates the Fourth Amendment and the scrupulous exactitude standard. *Perrone*, 119 Wn.2d at 553. "Rather, what is required is a description of these materials by title or similar identifying

characteristic, or by a specific statement as to the type of contents [that] would render the materials presumptively obscene." 2 LaFave, *supra*, § 4.6(e), at 640.

3.13(b) Intrusions into the Body

In 1952, the United States Supreme Court considered whether a physical intrusion into a person's body violates due process and determined that due process is violated if the intrusion "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209, 96 L. Ed. 183, 190 (1952) (concluding that stomach pumping without a warrant to obtain evidence violated due process). Subsequent to *Rochin*, however, the Supreme Court reversed itself, and applied the Fourth Amendment exclusionary rule to the states. *See Mapp v. Ohio*, 367 U.S. 643, 657, 81 S. Ct. 1684, 1692, 6 L. Ed. 2d 1081, 1091 (1961). Consequently, the Court has not relied on the *Rochin* "shocks the conscience" standard exclusively but has instead applied a Fourth Amendment reasonableness analysis in cases like *Rochin* that involve highly intrusive searches and seizures. *See generally United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985); *Winston v. Lee*, 470 U.S. 753, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985); *Schmerber v. California*, 384 U.S. 757, 766–72, 86 S. Ct. 1826, 1833–36, 16 L. Ed. 2d 908, 917–20 (1966). Thus, for example, "[a] compelled surgical intrusion into an individual's body for evidence implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime." *Winston*, 470 U.S. at 759, 105 S. Ct. at 1616, 84 L. Ed. 2d at 668. *But see Schmerber*, 384 U.S. at 770–72, 86 S. Ct. at 1835–36, 16 L. Ed. 2d at 916–20 (holding that blood alcohol content may be obtained under certain circumstances). An intrusion that is reasonable is one in which (1) there is a clear indication, rather than a mere chance, that the intrusion will produce the desired evidence; (2) the intrusive procedure is reasonably suited to obtaining the evidence, as for example, a blood test used for determining blood alcohol levels; and (3) the intrusive procedure is performed in a reasonable manner, as, for example, a blood test performed by medical personnel rather than by officers at the station house. 2 LaFave, *supra*, § 4.1(e), at 458–59.

Thus, for example, taking a blood sample from a defendant charged with negligent homicide is valid when the police have probable cause to believe that evidence of intoxication will be found and that the test used to measure blood alcohol content is reasonable and performed in a reasonable manner. *See* RCW 46.20.308(3); *State v. Curran*, 116 Wn.2d 174, 185, 804 P.2d 558, 564 (1991) (en banc); *see also State v. Kala-*

kosky, 121 Wn.2d 525, 532, 852 P.2d 1064, 1068 (1993) (en banc) (holding that valid search warrant based on probable cause is constitutionally sufficient to obtain blood sample from suspect); *State v. Komoto*, 40 Wn. App. 200, 208, 697 P.2d 1025, 1031 (1985) (holding that probable cause is established if person appears intoxicated and intoxication is an element of the crime for which the suspect is arrested).

Washington has also upheld mandatory blood testing in cases of putative fathers, *see State v. Meacham*, 93 Wn.2d 735, 739, 612 P.2d 795, 798 (1980) (en banc), and has upheld mandatory HIV and DNA testing of convicted sexual offenders. *See Kalakosky*, 121 Wn.2d at 536 (holding that mandatory HIV testing of sexual offenders presents a minimal Fourth Amendment intrusion for which the State's reasons are compelling). *See also State v. Olivas*, 122 Wn.2d 73, 93, 856 P.2d 1076, 1086 (1993) (en banc) (holding that statute requiring mandatory DNA testing of convicted sexual offenders in order to establish DNA databank is constitutionally permissible).

More intrusive procedures may be permitted in special environments such as prisons and jails. *See Bell v. Wolfish*, 441 U.S. 520, 560, 99 S. Ct. 1861, 1885, 60 L. Ed. 2d 447, 482 (1979) (finding full body cavity searches of prison inmates following contact visits not unreasonable, even when searches are routine and not based on probable cause); *State v. Harris*, 66 Wn. App. 636, 642, 833 P.2d 402, 405 (1992) (finding exigent circumstances justified strip search of juvenile before placement in holding cell when police had prior experience with gang members taping razor blades to their skin). Similar intrusive procedures may be allowed at borders. *See Montoya de Hernandez*, 473 U.S. at 537, 105 S. Ct. at 3308, 87 L. Ed. 2d at 388–89 (1985) (holding that suspect fitting profile for alimentary canal drug smuggler may be subjected to rectal cavity search when search warrant was based on profile and suspect's unwillingness to eat, drink, or defecate during sixteen-hour confinement). *See generally infra* §§ 6.2 (prisons), 6.3 (borders).

The Washington Constitution affords no greater protection to an arrestee for warrantless body strip searches than does the federal constitution. *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359, 1364 (1995) (finding warrantless strip search of arrestee in local detention center reasonable when security needs of local jail outweighed privacy interest of arrestee).

Other factors considered include whether the search is necessary for a fair determination of the charges and whether opportunities for an adversary hearing and interlocutory appellate review are available. *See Winston*, 470 U.S. at 762, 105 S. Ct. at 1617–18, 84 L. Ed. 2d at 670

(holding that the community's interest in determining the guilt or innocence of a party is a balancing measure).

3.13(c) Warrants Directed at Nonsuspects

In 1978, the United States Supreme Court held that the Fourth Amendment provides the same special protections against search and seizure for the possessor of evidence who is not the suspect of a crime. *Zurcher v. Stanford Daily*, 436 U.S. 547, 559–60, 98 S. Ct. 1970, 1978, 56 L. Ed. 2d 525, 537–38 (1978) (holding that probable cause to issue a valid search warrant merely requires that officers demonstrate that the fruits, instrumentalities, or evidence of a crime be located on the premises to be searched). Critics have argued that a search warrant of a third party is per se unreasonable and that a subpoena duces tecum can adequately protect law enforcement interests. *See* Note, *The Reasonableness of Warranted Searches of Nonsuspect Third Parties*, 44 Alb. L. Rev. 212, 232–35 (1979) (criticizing *Zurcher* for failing to adopt a less drastic alternative or less intrusive practice test in Fourth Amendment cases).

In response to *Zurcher*, Congress enacted the Privacy Protection Act of 1980 ("PPA"), 42 U.S.C. §§ 2000aa–2000aa-12 (1994). *See* S. Rep. No. 96-874, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3950, 3950. The PPA prohibits the government from searching or seizing any work product material "possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" without first issuing a subpoena duces tecum. 42 U.S.C. § 2000aa(a). The PPA "affords the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment." S. Rep. No. 96-874, at 4. Such protections of nonsuspects, however, has not been extended outside the media. *See United States v. Humphreys*, 982 F.2d 254, 258 (8th Cir. 1992) (upholding a warrant to search an attorney's office on probable cause that attorney was evading taxes); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (en banc) (finding that the protections of client confidentiality, attorney-client privilege, attorney work product, and a criminal defendant's constitutional right to counsel cannot keep enforcement officers from rummaging through documents in search of items to be seized when such officers possess a warrant to search an attorney's office). *See generally* 2 LaFave, *supra*, § 4.1(f)–(h).

CHAPTER 4:
SEIZURE OF THE PERSON: ARRESTS AND STOP-AND-FRISKS

4.0 SEIZURE: INTRODUCTION

This chapter covers principles that are unique to seizure of the person. Related issues are discussed *supra* ch. 2 (probable cause); *supra* § 3.7 (knock and announce); and *infra* § 5.1 (search incident to arrest).

Under the Fourth Amendment, a seizure occurs when an officer, by physical force or by show of authority, restrains an individual's freedom of movement. *See United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980). Restraint amounting to a seizure occurs when a reasonable person would not feel free to leave the area. *See Terry v. Ohio*, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889, 903 (1968). This objective test considers the coercive effect of the officer's conduct in the particular situation to determine the impression conveyed to a reasonable person in a similar situation. *See Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S. Ct. 1975, 1979, 100 L. Ed. 2d 565, 572 (1988).

In slight contrast to the Fourth Amendment, the Washington Constitution has generally been interpreted as providing greater protection of individual privacy interests. *See State v. Young*, 135 Wn.2d 510, 957 P.2d 681 (1998) (en banc). Under Article I, Section 7, a seizure occurs when a reasonable person, under the totality of the circumstances, would not feel free to either (1) leave or (2) decline the officer's requests, due to an officer's use of force or display of authority. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202, 205 (2004) (en banc); *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489, 495 (2003) (en banc). Whether a reasonable person would feel free to leave is not based on the defendant's behavior; rather, it is determined by objectively looking at the law enforcement officer's actions. *Rankin*, 151 Wn.2d at 695; *O'Neill*, 148 Wn.2d at 574 (citing *State v. Young,* 135 Wn.2d 498, 501, 957 P.2d 681, 682 (1998) (en banc)); *see also State v. Hansen*, 99 Wn. App. 575, 576, 994 P.2d 855, 856 (2000) (per curiam) (holding that handing defendant's identification from one officer to another for the purpose of identification does not amount to a seizure under the Fourth Amendment).

Specifically, a determination of whether a reasonable person would feel free to leave is based on the officer's coercive conduct. *See O'Neill*, 148 Wn.2d at 574; *see also State v. Knox*, 86 Wn. App. 831, 839, 939 P.2d 710, 714 (1997). Coercive conduct is established by a series of acts, rather than a single act, that conveys a seizure. *See State v. Soto-Garcia*, 68 Wn. App. 20, 25, 841 P.2d 1271, 1273 (1992) (finding that when offi-

cer asked defendant both whether he had drugs on his person and whether the officer could search him, the situation was of such a nature as to prevent a reasonable person from feeling free to leave); *cf. State v. Toney*, 60 Wn. App. 804, 807–08, 810 P.2d 929, 931 (1991) (finding that no seizure occurred because there was no evidence that the officer drove aggressively or intentionally singled defendant out). In deciding whether an individual has been seized, the relevant question is whether, under the circumstances, police conduct would have communicated to a reasonable person that he was not free to leave. *State v. Avila-Avina*, 99 Wn. App. 9, 14, 991 P.2d 720, 724 (2000) (finding that seizure occurred when defendant voluntarily entered police car, which could not be opened from inside, and a police officer was either in the car or nearby at all times).

4.1 ARREST

Although a seizure restrains an individual's freedom of movement, not all seizures amount to arrests. *See State v. Lyons*, 85 Wn. App. 268, 270, 932 P.2d 188, 189 (1997) (finding that investigative detention was not transformed into an arrest when the investigating officer physically restrained a suspect and stated that he was under arrest). For instance, a seizure, but not necessarily an arrest, has taken place when a police officer asks an individual to step out of his or her car during a stop. *See State v. O'Neill*, 148 Wn.2d 564, 581–82, 589, 62 P.3d 489, 499, 503 (2003) (en banc) (finding that a police officer who shined a spotlight into a parked car and asked the driver for identification did not seize defendant until the officer asked him to exit the car because at that point a reasonable person in defendant's shoes would not believe himself free to leave). Thus, the relevant inquiry to determine whether a person is in custody is whether a reasonable person in the suspect's position would have thought he or she was in custody. *See State v. Radka*, 120 Wn. App. 43, 50, 83 P.3d 1038, 1041 (2004) (finding that no arrest occurred when suspect was told he was under arrest and placed in back of patrol car, because officer did not frisk or handcuff the suspect and officer allowed suspect to make calls on his cell phone from the back of the police car); *see also State v. Rivard*, 131 Wn.2d 63, 75, 929 P.2d 413, 419 (1997) (en banc) (finding that no arrest occurred because defendant was not physically apprehended, restrained, handcuffed, placed in a police vehicle, or approached by officers who had weapons drawn).

It is no defense to a criminal prosecution that a defendant was illegally arrested. *Ker v. Illinois*, 119 U.S. 436, 444, 7 S. Ct. 225, 229, 30 L. Ed. 421, 424 (1886); *State v. Waters,* 93 Wn. App. 969, 976, 971 P.2d 538, 542 (1999). However, the legality of the arrest affects the legality of the searches and confessions taking place subsequent to the arrest, as

well as the admissibility of evidence derived from the arrest. *See generally infra* ch. 7.

4.2 ARRESTS WITHOUT WARRANTS: PUBLIC VERSUS HOME ARRESTS

Arrests are not subject to the same strict warrant requirements as searches, and an officer may make a warrantless felony arrest in a public place even though he or she had time to obtain a warrant. *See United States v. Watson*, 423 U.S. 411, 422–23, 96 S. Ct. 820, 827–28, 46 L. Ed. 2d 598, 608–09 (1976); *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993). Nonetheless, such arrests must still be supported by probable cause. 3 Wayne R. LaFave, *Search and Seizure* § 5.1(b), 14–16 (4th ed. 2004). Probable cause is essentially defined as a reasonable belief of guilt particularized to the person to be searched or seized. *Maryland v. Pringle*, 540 U.S. 366, 371, 124 S. Ct. 795, 800, 157 L. Ed. 2d 769, 775 (2003). Probable cause, however, is not subject to calculation by formula or by mathematical certainty. *See State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731, 733 (1995). Thus, a defendant is entitled to a prompt judicial determination of probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 126, 95 S. Ct. 854, 869, 43 L. Ed. 2d 54, 72 (1975); *see also infra* § 4.5(c).

Although police may make a warrantless arrest in a public area, in the absence of exigent circumstances they may not make a warrantless arrest after a nonconsensual entry into a suspect's home. *Payton v. New York*, 445 U.S. 573, 589–90, 100 S. Ct. 1371, 1381–82, 63 L. Ed. 2d 639, 652–53 (1980). Exigent circumstances exist when the time required to obtain a warrant would result in the suspect's escape, injury to either the officers or the public, or the destruction of evidence. *See Gooch*, 6 F.3d at 679; *State v. White*, 129 Wn.2d 105, 112–13, 915 P.2d 1099, 1103 (1996) (en banc). Fact patterns constituting exigent circumstances are described in detail, *infra* §§ 5.16–.20. *See generally* William C. Donnino & Anthony J. Girese, *Exigent Circumstances for a Warrantless Home Arrest*, 45 Alb. L. Rev. 90 (1980). The *Payton* prohibition on a warrantless, nonconsensual entry of a suspect's home has been applied to several Washington cases, including *White*, 129 Wn.2d at 109 (declining to extend *Payton* beyond the protection of the home), and *State v. Griffith*, 61 Wn. App. 35, 41, 808 P.2d 1171, 1174 (1991) (finding warrantless arrest at suspect's home lawful due to exigent circumstances).

In Washington, the arrest of a suspect who is standing in the doorway of his or her home is treated the same as an arrest in the home. *See State v. Solberg*, 122 Wn.2d 688, 697, 861 P.2d 460, 465 (1993) (citing *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89, 91 (1985)). As such, for Fourth Amendment purposes the location of the suspect, and

not the location of the officer, is material to the issue of whether an arrest occurs in the home. *See Holeman*, 103 Wn.2d at 429. Thus, an officer is prohibited from arresting a suspect standing in the doorway of the home without a warrant unless exigent circumstances exist. *See Solberg*, 122 Wn.2d at 697. However, an arrest of a suspect who is on a front porch, as opposed to in the doorway, is considered a public arrest. *See id.* at 698 (stating that the "conclusion that a warrantless arrest on a porch is an illegal arrest conflicts with authority from other Washington decisions, other jurisdictions, and scholarly comment").

Under the Fourth Amendment, police who make a warrantless arrest outside an arrestee's home may then accompany the arrestee into his or her home even if the arrestee, with the officer's consent, enters the home for the purpose of obtaining identification. *See Washington v. Chrisman*, 455 U.S. 1, 6–7, 102 S. Ct. 812, 817, 70 L. Ed. 2d 778, 785–86 (1982) (finding risk of danger to officer and possibility of confederates' escape justified police officer's act of accompanying arrested person into dwelling, and holding that police need no affirmative indication of likelihood of danger or escape).

Washington, however, has rejected the bright-line rule that an officer may, in all circumstances, accompany an arrestee into the arrestee's home. *See State v. Chrisman*, 100 Wn.2d 814, 820–21, 676 P.2d 419, 423 (1984) (en banc). Under Article I, Section 7, when a person is arrested for a minor violation, the arresting officer may not follow the arrestee into his or her home unless the officer can reasonably conclude that the officer's safety is endangered, that evidence might be destroyed, or that escape is a strong possibility. *See Gooch*, 6 F.3d at 679; *White*, 129 Wn.2d at 112–13 (reiterating factors that constitute exigent circumstances). A police officer may accompany an arrestee into his or her residence without a warrant if the officer knows of specific, articulable facts that indicate a threat to the officer's safety. *State v. Wood*, 45 Wn. App. 299, 308–09, 725 P.2d 435, 440 (1986) (finding that sufficient reason existed to accompany the arrestee into residence for security purposes when officer was executing an arrest warrant for a felony parole violation).

An officer may also enter a home without a warrant in response to a medical emergency. *State v. Schroeder*, 109 Wn. App. 30, 39 n.6, 32 P.3d 1022, 1026 n.6 (2001). A warrantless search based on the emergency exception is valid only if (1) the officer subjectively believed that someone likely needed assistance for health or safety reasons; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched. *State v. Gibson*, 104

Wn. App. 792, 796–97, 17 P.3d 635, 637–38 (2001) (upholding arrest of defendant under emergency exception to warrant requirement when officers called to the house secured the safety of the children but upon further search of the house discovered defendant emptying bags of marijuana).

4.3 ARRESTS WITHOUT WARRANTS: FELONY VERSUS MISDEMEANOR ARRESTS

4.3(a) Felony Arrest

This section discusses differences in the warrant requirements for felony and misdemeanor arrests. For a discussion of custodial arrests for misdemeanor offenses, see *infra* § 4.5(d). Under the common law standard and the Fourth Amendment, an officer's authority to make a warrantless arrest in public generally applies to felonies. *See United States v. Watson*, 423 U.S. 411, 422–23, 96 S. Ct. 820, 827–28, 46 L. Ed. 2d 598, 608–09 (1976). While some states have placed restrictions on warrantless felony arrests, Washington has codified the common law rule. RCW 10.31.100.

4.3(b) Misdemeanor Arrest

Under common law, an officer can make a warrantless arrest of a person who breaches the peace. *See Kalmas v. Wagner*, 133 Wn.2d 210, 218, 943 P.2d 1369, 1373 (1997) (en banc) (citing *Pavish v. Meyers*, 129 Wn. 605, 606–07, 225 P. 633, 633–34 (1924)); 3 Wayne R. LaFave, *Search and Seizure* § 5.1(b), at 16 (4th ed. 2004). However, an officer's authority to make such an arrest under the common law is not restricted to offenses involving a breach of the peace. *Atwater v. City of Lago Vista*, 532 U.S. 318, 327, 121 S. Ct. 1536, 1543, 149 L. Ed. 2d 549, 560 (2001). Thus, before making a warrantless misdemeanor arrest, an officer must have probable cause to believe that a misdemeanor is being committed in his presence. *State v. Thompson*, 69 Wn. App. 436, 441, 848 P.2d 1317, 1320 (1993). The common law misdemeanor rule has not been held to be constitutionally required, and many states have enacted statutes applying the misdemeanor rule to felonies. *See Watson*, 423 U.S. at 418–21, 96 S. Ct. at 825–27, 46 L. Ed. 2d at 606–08. Some states that require warrants for misdemeanors have held that a statutory violation, as opposed to a constitutional violation, is not grounds for the suppression of evidence obtained as a result of the arrest. *See, e.g., State v. Eubanks*, 283 N.C. 556, 559–60, 196 S.E.2d 706, 708–09 (1973).

Similarly, Washington permits an officer to make a warrantless misdemeanor arrest when the offense is being committed, or has been committed, in the officer's presence. RCW 10.31.100; *State v. Green*, 150 Wn.2d 740, 742, 82 P.3d 239, 240 (2004) (per curiam). However, the statute sets out several exceptions that permit an officer to make a warrantless misdemeanor arrest where the offense is not committed in the officer's presence. RCW 10.31.100. An officer may make a warrantless misdemeanor arrest if the offense (1) involves criminal trespass, physical harm, or the threat of physical harm to persons or property; (2) is for possession of marijuana, or possession or consumption of alcohol by a minor; (3) is for violation of a restraining order; (4) is witnessed by another officer; or (5) is for one of a number of specified traffic offenses. *See id. But compare State ex rel. McDonald v. Whatcom County Dist. Ct.*, 92 Wn.2d 35, 38, 593 P.2d 546, 547 (1979) (en banc) (holding that an officer may not make an arrest at a location other than the accident scene) *with State v. Teuber*, 19 Wn. App. 651, 654–55, 577 P.2d 147, 149–50 (1978) (holding that an officer may make lawful misdemeanor arrest for offense committed four hours earlier when offense involves physical harm to property).

The "in the presence" requirement of RCW 10.31.100 is satisfied whenever the officer directly perceives facts permitting a reasonable inference that a misdemeanor is being committed. *See City of Snohomish v. Swoboda*, 1 Wn. App. 292, 295, 461 P.2d 546, 548–49 (1969). Questions arise as to whether the officer must view all the elements of a crime and as to what types of information may be used to fill in "gaps." *Id.* (finding the "in the presence" requirement satisified when, as part of "sting" operation, police officers observed a person, from 150 feet away, handing an object to another, and holding that even though police could not positively identify the object, the nature of the operation permitted a reasonable inference that the object was contraband); *see also State v. Silverman*, 48 Wn.2d 198, 202–03, 292 P.2d 868, 870–71 (1956) (finding the "in the presence" requirement satisfied for possession of obscene pictures with intent to show them when officer entered establishment as member of public and viewed "peep shows").

Originally, the misdemeanor offense of possessing or consuming alcohol by a person under 21 years of age, RCW 66.44.270 (1955), was not considered committed in an officer's presence if the officer did not witness the person's ingestion of the alcohol. *State v. Allen*, 63 Wn. App. 623, 625, 821 P.2d 533, 534–35 (1991). However, the Washington Legislature realized that such a requirement was problematic. Thus, in 1987, the legislature amended RCW 66.44.270 to allow an officer to arrest a person under the age of 21 for possessing or consuming alcohol if the

officer had probable cause to believe that the person had alcohol or other drugs in his system. *See* RCW 10.31.100; *see State v. Preston*, 66 Wn. App. 494, 497–98, 832 P.2d 513, 515–16 (1992) (citing *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986)). *See generally* 3 LaFave, *supra*, § 5.1(c) (discussing what constitutes "in the presence").

4.4 ARRESTS WITH WARRANTS

The principles governing the procurement and execution of search warrants also apply to arrest warrants. *See supra* ch. 3; Wash. CrR 2.2; RCW 10.31.030. Thus, an invalid warrant will not support an arrest. *See Whiteley v. Warden*, 401 U.S. 560, 568–69, 91 S. Ct. 1031, 1037, 28 L. Ed. 2d 306, 313 (1971); 3 Wayne R. LaFave, *Search and Seizure* § 5.1(h), at 64–65 (4th ed. 2004).

A seizure is lawful if an officer has reasonably articulable grounds to believe that the suspect is the intended arrestee named in the warrant. *State v. Smith*, 102 Wn.2d 449, 453–54, 688 P.2d 146, 149 (1984) (en banc). If doubt arises as to identity, the officer is expected to immediately take reasonable steps to confirm or deny that the warrant applies to the person being held. *Id.* at 454. The initial arrest, however, must be based on more than the individual's similarity to the general physical description set forth in the warrant. *See Smith*, 102 Wn.2d at 454 (applying the test articulated in *Sanders v. United States*, 339 A.2d 373, 379 (D.C. Cir. 1975), and finding seizure of "chako sticks" unlawful).

Under statutory law in Washington, a person arrested under the authority of a warrant must first be read the warrant and, if the person wishes to deposit bail, taken without delay before a judge. RCW 10.31.030; *State v. Caldera*, 84 Wn. App. 527, 528, 929 P.2d 482, 482 (1997) (per curiam) (finding the search of two defendants who were searched prior to being read the warrant or taken before a judge to deposit bail illegal).

4.5 ARRESTS: MISCELLANEOUS REQUIREMENTS

4.5(a) Use of Force

Under traditional common law, an officer was permitted to use reasonable force to make an arrest, and the officer could use deadly force if such force reasonably appeared necessary to prevent a suspect's escape from a felony arrest. *See Tennessee v. Garner*, 471 U.S. 1, 13–15, 105 S. Ct. 1694, 1702–03, 85 L. Ed. 2d 1, 10–12 (1985). The common law rule has been restricted, however, and an arresting officer may use deadly force only when he or she "has probable cause to believe that the suspect

poses a significant threat of death or serious physical injury to the officer or others." *Id.* at 11, 105 S. Ct. at 1696–97, 85 L. Ed. 2d at 3 (holding that police were not permitted to shoot unarmed, fleeing burglary suspect).

In Washington, the amount of force an officer may use is governed by statute to the extent that the statute is consistent with *Garner*. *See, e.g.*, RCW 10.31.050 ("If after notice of the intention to arrest the defendant, he either flee[s] or forcibly resist[s], the officer may use all necessary means to effect the arrest."); RCW 9A.16.040 (listing specific situations in which officer is justified in using deadly force).

In a Washington case decided before *Garner*, the court upheld the use of a chokehold to prevent destruction of evidence even though the officers did not fear harm to themselves or to the public. *See State v. Taplin*, 36 Wn. App. 664, 666, 676 P.2d 504, 506 (1984) (finding that chokehold used to prevent defendant from swallowing balloons suspected of containing heroin did not violate due process or Fourth Amendment rights because defendant was capable of breathing when chokehold was applied); *cf. infra* §§ 5.2(a), 5.18(a). The legislature specifically limited the use of deadly force under RCW 9A.16.040(1)(c) to instances in which the officer has "probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or . . . others." RCW 9A.16.040(2). The use of deadly force by a public officer is justified "when necessar[y] . . . to overcome actual resistance to the execution of the legal process . . . or in the discharge of a legal duty." RCW 9A.16.040(1)(b). In particular, deadly force is justified when either a public officer or a person acting under his command and in the officer's aid assists the officer by:

> i) arrest[ing] or apprehend[ing] a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;
>
> ii) prevent[ing] the escape of a person from a federal or state correctional facility or in retak[ing] a person who escapes from such a facility; or
>
> iii) prevent[ing] the escape of a person from a county or city jail . . . if the person has been arrested for, charged with, or convicted of a felony; or
>
> iv) lawfully suppress[ing] a riot if the actor or another participant is armed with a deadly weapon.

RCW 9A.16.040(1)(c).

In construing a prior statute, the Washington Supreme Court held that deadly force may be used even when a felony has not in fact occurred so long as the officer reasonably believes that a felony has been committed. *See Reese v. Seattle*, 81 Wn.2d 374, 379–80, 503 P.2d 64, 69–70 (1972) (en banc). In *Reese*, the court stated that "[g]reat caution must be exercised by an officer in the use of deadly force and it must be resorted to by an officer only when all other reasonable efforts to apprehend a person fleeing from a *lawful arrest* for a felony have failed." *Id.* at 382–83 (emphasis in original). In light of *Garner* and amendments to RCW 10.31.050, an officer must show probable cause, rather than merely reasonable cause. *See Garner*, 471 U.S. at 13–15, 105 S. Ct. at 1702–03, 85 L. Ed. 2d at 10–12; *see also* RCW 10.31.050.

4.5(b) Significance of Booking and Crime Charged: Pretextual Arrests

Courts differ as to the significance of a suspect being booked for one offense yet being formally charged with another. Conflicting considerations underlie the decisions. On the one hand, if the booking and formal charges need not be similar, police can use an arrest as a pretext for detaining a suspect for questioning about an unrelated crime for which the police lack probable cause. On the other hand, at the time police first establish probable cause for one crime, they may not possess sufficient information to establish probable cause for another. *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 5.1(e) (4th ed. 2004). In Washington, the formal charge may differ from the booking charge. *See State v. Teuber*, 19 Wn. App. 651, 655–56, 577 P.2d 147, 150 (1978). The booking charge has no significance after a formal charge has been lodged, and booking "for investigation" is permissible provided that probable cause for an arrest on any charge is present. *See State v. Thompson*, 58 Wn.2d 598, 606–07, 364 P.2d 527, 532 (1961) (en banc).

When a suspect is arrested for a misdemeanor not committed in the officer's presence, the arrest is not illegal if the arresting officer has knowledge of a felony for which the suspect could have been arrested. *See State v. Stebbins*, 47 Wn. App. 482, 485, 735 P.2d 1353, 1355 (1987).

4.5(c) Judicial Review

A person arrested without a warrant is entitled to a post-arrest probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 863, 43 L. Ed. 2d 54, 65 (1975) ("Once the suspect is in custody . . . the reasons that justify dispensing with the magistrate's neutral judgment evaporate."). A neutral and detached magistrate must make the probable

cause determination, but the hearing may be ex parte. *See id.* at 119–23, 95 S. Ct. at 865–68, 43 L. Ed. 2d at 68–71.

Courts have not resolved the issue of whether a violation of the *Gerstein* rule requires suppression of evidence seized after the arrest. *See* 3 LaFave, *supra*, § 5.1(g), at 62–64; *see also Williams v. State*, 264 Ind. 664, 669–70, 348 N.E.2d 623, 627–28 (1976) (suppressing defendant's voluntary confession when, following probable cause arrest, defendant was held for eight days without judicial determination of probable cause and confession was made during that detention).

4.5(d) Custodial Arrests for Minor Offenses

Until the last decade, a question remained as to whether the Fourth Amendment imposes some limits on the making of arrests, such as the need for actual custody, aside from the probable cause requirement. 3 LaFave, *supra*, § 5.1(i), at 77–78. During that time, some lower courts supported the proposition that an arrest may be "unreasonable" in the Fourth Amendment sense because of an absence of a need for custody. *Id.* In 2001, however, the United States Supreme Court held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354–55, 121 S. Ct. 1536, 1557, 149 L. Ed. 2d 549, 577 (2001) (upholding the arrest of an individual for failing to secure herself and her children with safety belts).

State law may still provide greater protection to its citizens for minor offenses than does the Fourth Amendment. For example, the Washington Court of Appeals has noted *Atwater's* bright-line rule but stated that because of the state's additional protection of privacy rights, Washington courts must draw the line differently than the United States Supreme Court. *State v. Pulfrey*, 120 Wn. App. 270, 283, 86 P.3d 790, 797 (2004), *rev. granted*, 152 Wn.2d 1021, 101 P.3d 108 (2004). Yet the court in *Pulfrey* noted that current Washington Supreme Court jurisprudence provided that no additional justification beyond probable cause need be shown where custodial arrest is authorized by statute. *Id.*

When civil proceedings, as opposed to criminal proceedings are involved, custodial arrests may be improper. The Washington Supreme Court has held a statute unconstitutional that authorized the custodial arrest of any person against whom a paternity complaint is filed. *See State v. Klinker*, 85 Wn.2d 509, 524, 537 P.2d 268, 279 (1975) (en banc). Thus, in the absence of a contrary showing, the usual summons and complaint procedure for civil cases is deemed adequate for securing the defendant's presence at trial. *See id.* at 522. However, criminal cases are

treated differently because the public interest in restraining the defendant is greater. *See id.* at 520.

Under Washington law, "as a matter of public policy . . . custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs [a] promise to appear" in court. *State v. Hehman*, 90 Wn.2d 45, 47, 578 P.2d 527, 528 (1978) (en banc); *see* 3 LaFave, *supra*, § 5.2(g), at 122–23 n.135. In one case, the Washington Supreme Court held that an officer was prohibited from making a custodial arrest for a minor traffic violation unless the officer had "other reasonable grounds [for the arrest] apart from the minor traffic violation itself." *Hehman*, 90 Wn.2d at 50. *See also State v. Reichenbach*, 153 Wn.2d 126, 135–36, 101 P.3d 80, 87 (2004) (finding arrest of passenger in informant's vehicle invalid because police lacked a warrant or probable cause, and the scope of the informant's consent to search the vehicle did not extend to the passenger). In 1979, the Washington Legislature amended RCW 46.64.015 to clarify when an officer must issue a citation and when an officer may arrest without a warrant. *See State v. Reding*, 119 Wn.2d 685, 689, 835 P.2d 1019, 1021 (1992) (en banc). Under the amended statute, custodial arrests for minor traffic violations are limited to situations involving specific statutory violations, a defendant's refusal to sign a promise to appear, and nonresident arrestees. *See State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038, 1040 (2004).

Custodial arrests are permissible, however, for non-minor offenses, such as reckless driving. *See Reding*, 119 Wn.2d at 688. Furthermore, a custodial arrest is not inappropriate merely because the offense is traffic-related. *See State v. Carner*, 28 Wn. App. 439, 444, 624 P.2d 204, 207 (1981) (finding arrest proper when minor tried to evade police on his motorcycle); *cf.* RCW 46.64.015 (police may detain suspect who refuses to sign a promise to appear in court).

A police officer may make a custodial arrest for a traffic violation when the violation is a crime rather than merely a traffic infraction, or when the circumstances surrounding the arrest dictate transferring the violator to another location for completion of the arrest process. *See State v. LaTourette*, 49 Wn. App. 119, 125, 741 P.2d 1033, 1036 (1987) (finding that officers' decision to move arrestee to another location to complete arrest for reckless driving was proper when hostile crowd gathered in parking lot); *see also Welsh v. Wisconsin*, 466 U.S. 740, 756–64, 104 S. Ct. 2091, 2101–04, 80 L. Ed. 2d 732, 747–52 (1984) (White, J., dissenting) (arguing that State acted within its proper police power in dealing with perceived seriousness of drunk driving when it enacted a statute permitting a warrantless arrest for the misdemeanor); *State v. McIntosh*, 42 Wn. App. 573, 576, 712 P.2d 319, 321 (1986) (finding arrest justified

when arrestee for misdemeanor traffic violation had no identification, did not claim to own the vehicle he was driving, and related a suspicious account of his activities).

Washington further distinguishes custodial and non-custodial arrests by allowing searches incident to arrest only in the case of a custodial arrest. *See State v. Craig*, 115 Wn. App. 191, 194–95, 61 P.3d 340, 341–42 (2002) (finding search valid based on custodial nature of arrest); *State v. McKenna*, 91 Wn. App. 554, 561–63, 958 P.2d 1017, 1021–23 (1998) (finding search invalid because it was done after suspect had been released from arrest for a nonviolent misdemeanor).

4.6 STOP-AND-FRISK: INTRODUCTION

Police investigatory stops that fall short of arrests may be based on proof less than probable cause. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968). Although these brief detentions, known as "*Terry* stops," fall within the scope of the Fourth Amendment, the public interest in crime detection and the relative nonintrusiveness of the stop permit a lower standard of proof. *See id.* at 20–27, 88 S. Ct. at 1879–83, 20 L. Ed. 2d at 905–09. Thus, the investigatory stop is tested against the Fourth Amendment's general proscription of unreasonable searches and seizures rather than the Amendment's probable cause requirement. *See id.* at 21, 88 S. Ct. at 1879, 20 L. Ed. 2d at 905.

Regardless whether Article I, Section 7 of the Washington Constitution or Fourth Amendment protection is at issue, for a seizure to be permissible, an officer must have "specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity." *Id.* at 22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906. Under the Fourth Amendment, reasonable suspicion is not based on the officer's subjective belief, but on an objective view of all of the facts. *See id.* However, under Article I, Section 7 of the Washington Constitution, reasonable suspicion requires consideration of the totality of the circumstances, including the officer's subjective belief. *See State v. Ladson*, 138 Wn.2d 343, 358–59, 979 P.2d 833, 843 (1999) (en banc). *See generally supra* § 2.9(b).

Once an officer possesses a reasonable suspicion, he or she may forcibly stop the suspect, but the stop must be a more limited intrusion than an arrest. *See Dunaway v. New York*, 442 U.S. 200, 209, 99 S. Ct. 2248, 2255, 60 L. Ed. 2d 824, 834 (1979). The reasonableness of the officer's conduct may be determined by the circumstances of the stop, including whether the officer was following standard procedures or routine practices in effecting the stop. *State v. Chapin*, 75 Wn. App. 460, 468,

879 P.2d 300, 305 (1994). Further, an investigatory stop will be held "reasonable" when "the limited violation of individual privacy" is outweighed by the public's "interests in crime prevention and detection." *Dunaway*, 442 U.S. at 209, 99 S. Ct. at 2255, 60 L. Ed. 2d at 834. Although a balancing test determines the permissible scope of a stop, once an intrusion is substantial enough to constitute an arrest, probable cause is necessary regardless of how substantial the public's interest may be. *See id.* at 212–16, 99 S. Ct. at 2256–58, 60 L. Ed. 2d at 835–38 (holding that custodial detention requires probable cause even when charges not filed and suspect not told that he is under arrest). *But cf. United States v. Montoya de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) (finding special governmental interest in detaining smugglers at border justified holding suspect 16 hours based on reasonable suspicion of transporting contraband); *see also infra* § 6.3.

Reasonable suspicion justifying an investigatory stop may ripen into probable cause for arrest if the totality of the circumstances would lead a reasonably cautious and prudent police officer with the arresting officer's experience to believe that the suspect had committed a crime. *State v. McIntosh*, 42 Wn. App. 579, 583–84, 712 P.2d 323, 326 (1986) (holding that suspect's inability to give rational account of appearance and presence in a high burglary area late at night, absence of identification, and presence of what appeared to be burglar's tools gave rise to probable cause to arrest); *State v. Crane*, 105 Wn. App. 301, 310, 19 P.3d 1100, 1105–06 (2001) (holding that suspect's action of approaching a house for which police were in the process of obtaining a search warrant and suspect's lack of identification did not ripen into probable cause such that officer could run a warrant check on the suspect). A temporary seizure of a suspect that falls short of an arrest does not require that the officer give the suspect a Miranda warning because a *Terry* stop is not a custodial interrogation. *State v. King*, 89 Wn. App. 612, 624–25, 949 P.2d 856, 863 (1998). However, if the officer's suspicion ripens into probable cause for arrest, a Miranda warning must be given. *State v. Mercer*, 45 Wn. App. 769, 777, 727 P.2d 676, 682 (1986); *see also State v. Cameron*, 47 Wn. App. 878, 885–86, 737 P.2d 688, 692 (1987); *State v. Marshall*, 47 Wn. App. 322, 324–25, 737 P.2d 265, 267 (1987).

Terry stops are permitted both to prevent ongoing or future criminal activity and to investigate completed crimes. *See United States v. Hensley*, 469 U.S. 221, 227, 105 S. Ct. 675, 679–80, 83 L. Ed. 2d 604, 611 (1985). For a discussion of the use of the reasonable suspicion standard in special environments, see *infra* §§ 6.1 (schools) and 6.3 (borders). *See generally* Peter Preiser, *Confrontations Initiated by Police on Less Than Probable Cause*, 45 Alb. L. Rev. 57 (1980); 4 Wayne R. La-

Fave, *Search and Seizure* §§ 9.3(b) (routine traffic stops), 9.7 (roadblocks), 9.8 (other brief detentions) (4th ed. 2004).

4.7 SATISFYING THE REASONABLE SUSPICION STANDARD

4.7(a) Factual Basis and Individualized Suspicion

The reasonable suspicion standard requires the officer's belief to be based on objective facts. *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357, 362 (1979). *See also State v. Perea*, 85 Wn. App. 339, 341–42, 932 P.2d 1258, 1259–60 (1997); *State v. Seitz*, 86 Wn. App. 865, 869–70, 941 P.2d 5, 8 (1997). The facts must be both "specific and articulable"; thus, an "inarticulate hunch" is not sufficient. *Terry v. Ohio*, 392 U.S. 1, 21–22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968); *State v. Thompson*, 93 Wn.2d 838, 842, 613 P.2d 525, 527 (1980); *see also Florida v. Rodriguez*, 469 U.S. 1, 6, 105 S. Ct. 308, 311, 83 L. Ed. 2d 165, 171 (1984) (per curiam); *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621, 629 (1981). As a result of his or her experience, however, an officer may be able to perceive a reasonable suspicion in conduct that an ordinary citizen would consider to be innocent. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884–85, 95 S. Ct. 2574, 2582, 45 L. Ed. 2d 607, 618–19 (1975); *see also State v. Rice*, 59 Wn. App. 23, 28–29, 795 P.2d 739, 741–42 (1990) (holding that an officer's experience will be considered when determining whether suspicion of wrongdoing was justified).

Individualized suspicion is generally required for a *Terry* stop. *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640–44, 61 L. Ed. 2d at 362; *State v. Kennedy*, 38 Wn. App. 41, 45–46, 684 P.2d 1326, 1329 (1984); *see also State v. Byrd*, 110 Wn. App. 259, 264, 39 P.3d 1010, 1013–14 (2002) (finding stopping a vehicle solely to determine the validity of the trip permit invalid); *State v. Penfield*, 106 Wn. App. 157, 162–63, 22 P.3d 293, 295–96 (2001) (finding that officer who stopped vehicle without any articulable suspicion of criminal activity on the part of the male driver could not lawfully ask male driver to identify himself when basis for stop was license suspension of female who was the vehicle's registered owner).

There are, however, several exceptions. For example, in some circumstances a stop may be based on less than individualized suspicion when "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown*, 443 U.S. at 51, 99 S. Ct. at 2640, 61 L. Ed. 2d at 362. Border checkpoints may constitute such a circumstance. *See infra* § 6.3. When individualized suspicion is lacking, however, officer discretion must be limited. For example, police of-

ficers stopping vehicles for driver's license and vehicle registration checks may not select the vehicles at random. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673–74 (1979); *see also State v. Thorp*, 71 Wn. App. 175, 181–82, 856 P.2d 1123, 1127 (1993) (holding that officers who lack probable cause or a reasonable suspicion may not randomly stop moving vehicles for questioning). For a checkpoint program to be upheld, it must be primarily designed to serve a purpose closely related to the identified problem; a program designed to uncover ordinary criminal wrongdoing violates the Fourth Amendment. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42, 121 S. Ct. 447, 454, 148 L. Ed. 2d 333, 343–44 (2000). For a discussion of stops not requiring individualized suspicion, see *infra* §§ 6.3 (stops at or near borders) and 5.24 (vehicle spot checks).

4.7(b) Particular Applications: Informants

When stops are based on information provided by informants, the information does not have to meet the same criteria required for probable cause. *See, e.g., Adams v. Williams*, 407 U.S. 143, 147, 92 S. Ct. 1921, 1924, 32 L. Ed. 2d 612, 617 (1972). *See generally supra* §2.5. The information must, however, carry some "indicia of reliability." *Adams*, 407 U.S. at 147, 92 S. Ct. at 1924, 32 L. Ed. 2d at 617 (finding sufficient indicia when the informant was known personally to the officer and had provided information in the past). For a discussion of cases surrounding *Adams*, see generally 4 LaFave, *supra*, § 9.4. *See also United States v. Butler*, 74 F.3d 916, 920–21 (9th Cir. 1996) (finding that detailed information provided by the informant plus independent observations by the officers involved were sufficient indicia of reliability to justify stop); *State v. Conner*, 58 Wn. App. 90, 95, 791 P.2d 261, 263 (1990) (holding that a stop based solely on information provided by an informant is impermissible absent either (1) circumstances suggesting the informant's reliability or (2) some corroborative observation suggesting either the presence of criminal activity or that the information was reliable).

In Washington, police must have some reason to believe that an informant is reliable and possesses "[s]ome underlying factual justification for the informant's conclusion" that a crime is being committed. *State v. Sieler*, 95 Wn.2d 43, 48, 621 P.2d 1272, 1275 (1980) (en banc). One reason for this is that individuals' positions as informants inherently affects their reliability. *See State v. Garcia*, 125 Wn.2d 239, 242, 883 P.2d 1369, 1370 (1994) (en banc) (holding that information provided by a citizen does not require a showing of the same degree of reliability as an informant because a citizen is not a "professional" informant).

No reliability may be inferred from an anonymous informant or from a named but unknown telephone informant, nor may the basis for the informant's knowledge be inferred from conclusory allegations. *Id.* Conclusory allegations may be sufficient, however, when independent police observations corroborate the presence of criminal activity or the reliability of the manner in which the information was obtained. *See id.*; *see also State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243, 246 (1975) (en banc); *State v. Kennedy*, 38 Wn. App. 41, 45–46, 684 P.2d 1326, 1329 (1984); *State v. Sykes*, 27 Wn. App. 111, 115–16, 615 P.2d 1345, 1347–48 (1980); *State v. McCord*, 19 Wn. App. 250, 254–55, 576 P.2d 892, 895 (1978).

An informant's tip may be sufficiently reliable to support a stop even when it would not support an arrest. *See, e.g., State v. Moreno*, 21 Wn. App. 430, 436–37, 585 P.2d 481, 485 (1978) (finding cause to stop, but not to arrest, when defendant arrived on flight specified by anonymous informant); *State v. Chatmon*, 9 Wn. App. 741, 748–49, 515 P.2d 530, 535 (1973) (finding a subsequent search invalid, not for officer's failure to 1) establish an anonymous informant's reliability; 2) obtain a description of the informant; or 3) failing to learn the informant's purpose for being at scene of crime and reason for wanting to remain anonymous, but rather because circumstances did not indicate probable cause).

Police may also make a *Terry* stop on the basis of information provided by other divisions or agencies. *See United States v. Hensley*, 469 U.S. 221, 230, 105 S. Ct. 675, 681, 83 L. Ed. 2d 604, 613 (1985); *see also Butler*, 74 F.3d at 921 (noting probable cause may be demonstrated through the collective knowledge of the officers involved in an investigation). Furthermore, the "fellow officer" rule justifies an arrest on the basis of a police bulletin, such as a hot sheet, as long as the issuing agency has sufficient information for probable cause. *See Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 560, 568, 91 S. Ct. 1031, 1037, 28 L. Ed. 2d 306, 313 (1971). The collective knowledge of law enforcement agencies that gives rise to a dispatch will be imputed to officers who act on it. *State v. O'Cain*, 108 Wn. App. 542, 544–45, 31 P.3d 733, 734 (2001). However, if the seizure is later challenged in court, the State must prove that the dispatch was based on a sufficient factual foundation to justify the stop at issue. *Id.* Consequently, if the issuing agency lacks probable cause, so does the arresting officer. *State v. Mance*, 82 Wn. App. 539, 542, 918 P.2d 527, 529 (1996). Further, an investigatory stop may be based on information provided by other police agencies regarding a completed crime so long as the length and the intrusiveness of the detention do not exceed that which would have been effected by the po-

lice agency providing the information. *State v. Dorsey*, 40 Wn. App. 459, 470, 698 P.2d 1109, 1115–16 (1985).

Some surrounding circumstances decrease the required level of reliability, however. For example, the Washington Supreme Court has suggested that when the tip involves a serious crime, less reliability is required for a stop than is required in other circumstances. *Sieler*, 95 Wn.2d at 50; *Lesnick*, 84 Wn.2d at 944–45. *See* 4 LaFave, *supra*, § 9.5(h), at 591–94, for a discussion of *State v. Lesnick*. Another factor that bears on the reasonableness of a police officer's temporary investigatory detention of the suspect is potential danger. *State v. Franklin*, 41 Wn. App. 409, 413, 704 P.2d 666, 669 (1985) (finding an investigatory stop justified when an anonymous informant observed a person displaying a gun in a public restroom and a police officer verified the informant's report of the person's attire and location). The need for immediate police action may outweigh concerns about the reliability of an unknown informant. *Id.*

4.7(c) Particular Applications: Nature of the Offense

Terry stops have been upheld for offenses ranging from aggravated robbery, *United States v. Hensley*, 469 U.S. 221, 105 S. Ct. 675, 83 L. Ed. 2d 604 (1985), to possession of narcotics, *Adams v. Williams*, 407 U.S. 143, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). A non-traffic, civil infraction is insufficient to justify a *Terry* stop. *State v. Duncan*, 146 Wn.2d 166, 175, 43 P.3d 513, 517 (2002) (en banc) (declining to extend *Terry* to general, nontraffic civil infractions). For arguments that *Terry* stops should be limited to investigations of serious offenses, see *Adams*, 407 U.S. at 151–53, 92 S. Ct. at 1926–27, 32 L. Ed. 2d at 619–21 (Brennan, J., dissenting). *See generally* 4 LaFave, *supra*, § 9.2(c); *cf. State v. Moreno*, 21 Wn. App. at 434 (characterizing possession of narcotics as a "serious" offense).

4.7(d) Examples of Satisfying or Failing to Satisfy the Reasonable Suspicion Standard

The mere fact that a suspect is in a high crime area will not justify a stop. *Brown*, 443 U.S. at 52, 99 S. Ct. at 2641, 61 L. Ed. 2d at 362–63; *see also State v. Barber*, 118 Wn.2d 335, 346, 823 P.2d 1068, 1075 (1992) (en banc) (holding that a person of a specific race being "out of place" in a particular geographic area can never amount to a reasonable suspicion); *State v. Seitz*, 86 Wn. App. 865, 867–70, 941 P.2d 5, 7–8 (1997) (holding that officers lacked reasonable suspicion to stop where officers saw occupants of a car speaking to a man on the sidewalk but did not observe drugs, money, or anything else change hands); *State v. Soto-*

Garcia, 68 Wn. App. 20, 25, 841 P.2d 1271, 1274 (1992) (stating that merely walking in the street in a known drug area late at night does not suggest that someone has committed a crime).

A person who simply acts suspiciously is not the proper subject of a stop in the absence of other circumstances. *Brown*, 443 U.S. at 51, 99 S. Ct. at 2639, 61 L. Ed. 2d at 360 (finding that police inappropriately stopped a person who was seen walking away from another person in an alley known for a high incidence of drug traffic); *State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41, 45 (1992) (finding that an officer investigating a report of suspicious behavior in a neighborhood inappropriately stopped a man who appeared startled when he saw the officer and turned onto another street to avoid him). Similarly, officers may not stop an individual merely because the individual is in proximity to others who are suspected of criminal activity. *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525, 527 (1980). *See supra* § 4.7(b). *But cf. Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2595–96, 69 L. Ed. 2d 340, 351 (1981) (holding that a valid search warrant for residence allows detention of occupants during search). *See generally* 2 LaFave, *supra*, § 4.9(d).

Washington case law continues to support an officer's use of a *Terry* stop. *See State v. Jones*, 117 Wn. App. 721, 728, 72 P.3d 1110, 1113 (2003), *rev. denied*, 151 Wn.2d 1006, 87 P.3d 1184 (2004) (holding that officer's observation of suspect in area known for narcotics crouching down in a corner picking up small pieces of an item consistent with the appearance of crack cocaine and who quickly began to leave the area upon noticing the presence of the officer was sufficient for investigatory stop); *State v. Garcia*, 125 Wn.2d 239, 242, 883 P.2d 1369, 1370 (1994) (per curiam) (finding that information given to police, combined with an officer's experience in narcotics and knowledge of location as high crime area justified investigative restraint); *State v. Little*, 116 Wn.2d 488, 497–98, 806 P.2d 749, 753–54 (1991) (en banc) (finding sufficient suspicion to conduct a *Terry* stop where officers were generally familiar with residents of a complex, did not recognize suspects, and defendant subsequently fled from the officers); *State v. Young*, 86 Wn. App. 194, 201, 935 P.2d 1372, 1375 (1997) (finding that suspect's dropping a soda can when illuminated by an officer's spotlight in an area known for drug activity supported an investigatory stop); *State v. Alcantara*, 79 Wn. App. 362, 366–67, 901 P.2d 1087, 1089 (1995) (holding that to permit a warrantless search would impermissibly blur the distinction between a *Terry* stop and those cases where the evidence provides probable cause for arrest); *State v. Rodriguez-Torres*, 77 Wn. App. 687, 693, 893 P.2d 650,

652 (1995) (reasoning that the *Terry* rationale for limited searches for potential weapons was based on concern for officer safety).

Other Washington decisions upholding *Terry* stops include: *State v. Thorn*, 129 Wn.2d 347, 354, 917 P.2d 108, 112 (1996) (en banc); *State v. Pressley*, 64 Wn. App. 591, 597, 825 P.2d 749, 752 (1992) (finding the manner in which the defendant reacted to the officers' presence consistent with behavior suggesting a drug buy); *State v. Rice*, 59 Wn. App. 23, 28, 795 P.2d 739, 742 (1990) (finding that the firing of shots indicated the presence of firearms and probable illegal conduct).

4.8 DIMENSIONS OF A PERMISSIBLE STOP

4.8(a) Time, Place, and Method

An investigatory stop may be based on less than probable cause when the intrusion on individual freedom is relatively minor. *Terry v. Ohio*, 392 U.S. 1, 30–31, 88 S. Ct. 1868, 1884–85, 20 L. Ed. 2d 889, 911 (1968). When an investigatory stop becomes as intrusive as an arrest, the stop is considered an arrest and requires probable cause. *Dunaway v. New York*, 442 U.S. 200, 216, 99 S. Ct. 2248, 2258, 60 L. Ed. 2d 824, 838 (1979).

A valid stop must be limited as to length, movement of the suspect, and investigative techniques employed. *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229, 238 (1983); *see also State v. Mitchell*, 80 Wn. App. 143, 145–46, 906 P.2d 1013, 1015 (1995); *State v. Fowler*, 76 Wn. App. 168, 172–73, 883 P.2d 338, 340 (1994) (holding that an officer exceeded the scope of a permissible stop when he removed a cigarette pack containing LSD from the suspect's pocket knowing that it was not a weapon). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 9.2(f) (4th ed. 2004). Generally, the level of suspicion required for an investigative stop of a pedestrian is the same as that required for an investigative stop of a vehicle. *See State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445, 448 (1986) (en banc).

The United States Supreme Court has declined to set an absolute limit on the permissible duration of a *Terry* stop in terms of minutes or hours. The duration of a stop is evaluated in terms of whether "the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the [suspect]." *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 1575, 84 L. Ed. 2d 605, 616 (1985); *see Royer*, 460 U.S. at 500, 103 S. Ct. at 1325, 75 L. Ed. 2d at 238 (noting that a stop may "last no longer than is necessary to effectuate the purpose of the stop"); *cf. State v. Cunningham*, 116 Wn. App. 219, 228–29, 65 P.3d 325, 329

(2003) (finding a 45-minute wait with suspect in handcuffs to be a permissible *Terry* stop and not a formal arrest because officer's questions related only to the identification of the suspect and suspect's actions caused the lengthy delay).

Detaining a suspect to preserve the "status quo" while police investigate suspicious circumstances justifying an investigatory stop may not exceed the scope of a *Terry* stop. *See State v. Miller*, 91 Wn. App. 181, 184, 955 P.2d 810, 812 (1998) (holding that officer was properly seeking to maintain status quo by waiting to see if violence would erupt between two suspects); *State v. Perea*, 85 Wn. App. 339, 342, 932 P.2d 1258, 1259–60 (1997) (holding that officers may temporarily detain a suspect pending results of a police radio check); *State v. Moon*, 45 Wn. App. 692, 695, 726 P.2d 1263, 1265 (1986) (finding a proper *Terry* stop where an officer detained a suspect in a room approximately 20 minutes while the robbery victim was brought to the room for identification and suspect was not searched or otherwise restrained in the interim). The means of investigation need not be the least intrusive available, provided the police do not act unreasonably "in failing to recognize or to pursue" a less intrusive alternative. *Sharpe*, 470 U.S. at 687, 105 S. Ct. at 1576, 84 L. Ed. 2d at 616. For example, a Washington court has held that an officer did not use the least intrusive means reasonably available to confirm or dispel his suspicion that a house was being burglarized when he ordered three juveniles out of the house at gunpoint. *State v. Johnston*, 38 Wn. App. 793, 798–99, 690 P.2d 591, 594 (1984).

The investigative methods employed in a *Terry* stop must be less intrusive than those employed in arrests in every respect, not merely duration. *Dunaway*, 442 U.S. at 210–11, 99 S. Ct. at 2255–56, 60 L. Ed. 2d at 834–35. *But cf. Illinois v. Caballes*, ___ U.S. ___, 125 S. Ct. 834, ____ L. Ed. ___ (2005) (holding that the arrival of a second officer with a police dog during a routine traffic stop did not violate motorist's Fourth Amendment rights when the dog was allowed to sniff the exterior of the vehicle while original officer was writing up a warning citation). For example, police may not transport a nonconsenting suspect in a patrol car to the police station and subject the suspect to custodial interrogation based only on a reasonable suspicion. *See Dunaway*, 442 U.S. at 212, 99 S. Ct. at 2256, 60 L. Ed. 2d at 836; *see also Hayes v. Florida*, 470 U.S. 811, 816–18, 105 S. Ct. 1643, 1647, 84 L. Ed. 2d 705, 710–11 (1985) (holding that police may not transport a suspect to the police station for fingerprinting absent probable cause, but may take fingerprints while stopping and questioning suspect on basis of reasonable suspicion); *Royer*, 460 U.S. at 496, 103 S. Ct. at 1323, 75 L. Ed. 2d at 235 (finding that seizing a suspect's luggage at an airport and directing the suspect to

a room for interrogation constituted an arrest); *State v. Gonzales*, 46 Wn. App. 388, 396, 731 P.2d 1101, 1107 (1986) (noting that handcuffing and transporting a suspect to a police station before probable cause to arrest arises, that is, before knowledge that a crime has been committed, may constitute an illegal arrest under the Fourth Amendment and Article I, Section 7). A radio call summoning the investigating officers to an apparently unrelated crime scene, however, may give rise to a reasonable suspicion sufficient to justify the officers transporting the suspect with them. *See State v. Sweet*, 44 Wn. App. 226, 232–33, 721 P.2d 560, 564 (1986); *cf. State v. Byers*, 85 Wn.2d 783, 787–88, 539 P.2d 833, 836 (1975) (discussing transportation to crime scene).

Transporting a suspect a short distance to obtain identification is within the permissible scope of a *Terry* stop when the police have knowledge of a reported crime, but the search may not be proper when there is only an observation of suspicious conduct. *See State v. Wheeler*, 108 Wn.2d 230, 237, 737 P.2d 1005, 1008 (1987) (en banc); *State v. Hoffpauir*, 44 Wn. App. 195, 198–99, 722 P.2d 113, 115–16 (1986) (finding suspect voluntarily consented to transportation to the crime scene for identification purposes); *see also Sweet*, 44 Wn. App. at 232–33 (finding that a suspect's demonstrated propensity to flee justified his being placed in patrol car and transported to an apparently unrelated crime scene).

Other Washington cases involving *Terry* stops include the following: *United States v. Salas*, 879 F.2d 530, 535 (9th Cir. 1989) (stating that it would be reasonable for an officer to assume that a narcotics dealer could be armed and dangerous if he had recently used cocaine); *State v. Collins*, 121 Wn.2d 168, 173–74, 847 P.2d 919, 922 (1993) (en banc) (holding that a *Terry* stop was justified where darkness prevented the officer from seeing clearly and the defendant had previously been arrested on an outstanding felony warrant); *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760, 762 (1991) (en banc) (finding that under the totality of circumstances presented to the officer, including the officer's experience, the location, and the suspect's conduct, sufficient reasonable suspicion existed to justify an investigatory stop); *State v. Randall*, 73 Wn. App. 225, 230–31, 868 P.2d 207, 210 (1994) (holding that the officer had a reasonable suspicion justifying a stop when he observed two males fitting the description of robbery suspects standing in a park six blocks from the site of the robbery); *State v. Biegel*, 57 Wn. App. 192, 195, 787 P.2d 577, 578 (1990) (stating that although an officer was justified in making a *Terry* stop where the officer suspected the defendant was engaged in a drug buy, the officer lacked probable cause to arrest without more justification).

4.8(b) Detention of Persons in Proximity to Suspect

The Washington Supreme Court has held that under the Fourth Amendment the mere fact of an individual's proximity to one independently suspected of criminal activity is insufficient to justify a stop. *State v. Thompson*, 93 Wn.2d 838, 841–42, 613 P.2d 525, 527–28 (1980) (holding that a stop based on driver's parking violation does not reasonably provide grounds to require identification of passengers absent an independent cause to question passengers). *See also State v. Chelly*, 94 Wn. App. 254, 260, 970 P.2d 376, 379 (1999) (finding the fact that passenger was not wearing a safety belt provided an officer with the authority to detain him for a reasonable period of time in order to identify him); *cf. State v. Serrano*, 14 Wn. App. 462, 466–68, 544 P.2d 101, 104–05 (1975). *See generally* 4 LaFave, *supra*, § 9.2(b).

4.8(c) Detention Related to Traffic Infractions

Pretextual traffic infraction stops made for the purpose of conducting warrantless investigations of matters unrelated to a person's driving violate Article I, Section 7 of the Washington Constitution. *State v. Myers*, 117 Wn. App. 93, 96, 69 P.3d 367, 369 (2003), *rev. denied*, 150 Wn.2d 1027, 82 P.2d 242 (2004) (citing *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833, 839 (1999) (en banc) (declining to follow federal law holding pretextual traffic stops not in violation of the Fourth Amendment)). "The reasonable articulable suspicion that a traffic infraction has occurred which justifies an exception to the [search] warrant requirement for an ordinary traffic stop does not justify a stop for criminal investigation." *Myers*, 117 Wn. App. at 98 (citing *Ladson*, 138 Wn.2d at 349). "A stop for a traffic infraction can be extended only when an officer has articulable facts from which the officer 'could reasonably suspect criminal activity.'" *State v. Lemus*, 103 Wn. App. 94, 101, 11 P.3d 326, 330 (2000) (citing *State v. Tijerina*, 61 Wn. App. 554, 629, 811 P.2d 241, 243 (1991); quoting *State v. Gonzales*, 46 Wn. App. 388, 394, 731 P.2d 1101, 1105 (1986)). If the initial traffic stop is unlawful, any evidence obtained from it will be inadmissible as fruit from a poisonous tree. *State v. Brown*, 119 Wn. App. 473, 475–76, 81 P.3d 916, 917 (2003) (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445, 447 (1986)). *See generally infra* § 5.27(c) (concerning enforcement of traffic regulations).

When determining if a particular traffic stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer and the objective reasonableness of the officer's behavior. *State v. Hoang*, 101 Wn. App. 732, 742–43, 6 P.3d 602, 607 (2000) (citing *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833, 843 (1999)) (holding that a stop was not pretextual because the officer

was acting within his normal traffic control duties); *State v. DeSantiago*, 97 Wn. App. 446, 448, 983 P.2d 1173, 1174 (1999) (finding a stop pretextual because officer subjectively believed suspect had just bought or sold drugs and officer deliberately followed suspect for 10 blocks looking for a reason to pull suspect over).

4.9 Constitutional Limitations on Compelled Responses to Investigatory Questions

Fourth Amendment guarantees prohibit an officer from forcibly stopping an individual in the absence of at least a reasonable suspicion of criminal activity. *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 2641, 61 L. Ed. 2d 357, 362–63 (1979). However, even when a police officer possesses a reasonable suspicion and forcibly detains and questions the suspect, the officer may not compel the suspect to answer. *Davis v. Mississippi*, 394 U.S. 721, 727 n.6, 89 S. Ct. 1394, 1397 n.6, 22 L. Ed. 2d 676, 681 n.6 (1969); *State v. White*, 97 Wn.2d 92, 105–06, 640 P.2d 1061, 1068–69 (1982) (en banc). Furthermore, a suspect's refusal to answer an investigating officer's questions cannot provide the basis for an arrest. *See White*, 97 Wn. App. at 106.

A number of states, including Washington, have enacted stop-and-identify statutes or other legislation designed in part to facilitate police investigation of ongoing or imminent crimes. *See, e.g., id.* at 95; *see also Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (addressing a California statute requiring loiterers to identify themselves to peace officers when requested). Some of these statutes have been struck down as unconstitutionally vague. *See, e.g., Kolender*, 461 U.S. at 361, 103 S. Ct. at 1860, 75 L. Ed. 2d at 911; *White*, 97 Wn.2d at 98–101. These statutes can be challenged on a number of grounds, including the implication of (1) the First Amendment right of free speech; (2) the Fifth Amendment right against self-incrimination; (3) the Fourteenth Amendment right of due process; and (4) the Fourth Amendment prohibition of unreasonable searches and seizures. *White*, 97 Wn.2d at 97 nn.1, 2. Thus, a *Terry* stop that survives a Fourth Amendment challenge may collapse under a challenge brought under another amendment.

4.10 Grounds for Initiating a Frisk

An officer conducting a *Terry* stop may conduct a limited search for weapons in order to protect himself or herself or persons nearby from physical harm. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968); *State v. Alcantara*, 79 Wn. App. 362, 366, 901 P.2d 1087, 1089 (1995). Even such a limited intrusion, however, is a

"search" within the meaning of the Fourth Amendment. *Terry*, 392 U.S. at 29, 88 S. Ct. at 1884, 30 L. Ed. 2d at 910.

The prerequisites to a pat-down for weapons are that the officer is legitimately in the presence of the party to be frisked and has grounds for a forcible stop. *See id.* at 32–33, 88 S. Ct. at 1885–86, 20 L. Ed. 2d at 912–13 (Harlan, J., concurring). A frisk may then be undertaken if the officer reasonably believes that the suspect "may be armed and presently dangerous" to the officer or others and if nothing in the course of an initial investigation dispels that fear. *Id.* at 30, 88 S. Ct. at 1884, 20 L. Ed. 2d at 911. A frisk may not be used as a pretext to search for incriminating evidence when the officer has no reasonable grounds to believe that the suspect is armed. *Sibron v. New York*, 392 U.S. 40, 64, 88 S. Ct. 1889, 1903, 20 L. Ed. 2d 917, 935 (1968).

Lower federal courts have read *Terry* to mean that for certain crimes in which the offender is likely to be armed, the right to conduct a protective search is "automatic"; for other crimes, such as possession of marijuana, additional circumstances must be present. *See* 4 Wayne R. LaFave, *Search and Seizure* § 9.6(a), at 625–28 (4th ed. 2004).

Washington requires the following for a valid frisk: (1) the initial stop is legitimate; (2) there is a reasonable safety concern justifying a protective frisk for weapons; and (3) the scope of the frisk is limited to the protective purposes. *State v. Lennon*, 94 Wn. App. 573, 580, 976 P.2d 121, 125 (1999) (citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919, 922 (1993)); *see State v. Smith*, 102 Wn.2d 449, 452–53, 688 P.2d 146, 148 (1984) (en banc) (noting that the fact a detention occurs in a high crime area is not in itself sufficient to justify a search); *State v. Harper*, 33 Wn. App. 507, 511, 655 P.2d 1199, 1201 (1982) (holding that an officer must have a "sufficient basis" to believe that an individual is armed in order to conduct a self-protective search). Thus, police may not take intrusive protective measures when they cannot articulate a reason for believing that a suspect is dangerous other than that the suspect was seen leaving in his car from the scene of a possible burglary. *State v. Williams*, 102 Wn.2d 733, 740–41, 689 P.2d 1065, 1069–70 (1984) (en banc).

An overt, threatening gesture is not a condition precedent to a seizure. *State v. Perez*, 41 Wn. App. 481, 484–86, 704 P.2d 625, 628–29 (1985) (finding that an officer's observation of a gun on the floor of suspect's car, the driver's bloodshot eyes, and the smell of alcohol constituted reasonable grounds to believe that the suspect was armed and might gain access to the weapon). Frisks have been permitted in a variety of situations. For example, in *State v. Guzman-Cuellar*, 47 Wn. App. 326, 332, 734 P.2d 966, 970 (1987), an officer was justified in initiating a

frisk where the suspect matched the description of a murder suspect. *See also State v. Laskowski*, 88 Wn. App. 858, 860–61 950 P.2d 950, 952 (1997) (finding a pat-down search of a suspect's backpack reasonable when another suspect was found with a live shotgun cartridge); *State v. Sweet*, 44 Wn. App. 226, 235–36, 721 P.2d 560, 565–66 (1986) (finding a justified reasonable suspicion that suspect was armed and dangerous where suspect fled from a high crime area when he saw officers and dropped a ski mask when apprehended); *State v. Harvey*, 41 Wn. App. 870, 875, 707 P.2d 146, 149 (1985) (holding that an officer was justified in making a protective search of a burglary suspect on the grounds that it is well-known that burglars often carry weapons); *State v. Galloway*, 14 Wn. App. 200, 201–02, 540 P.2d 444, 446 (1975) (allowing frisk where defendant entered an apartment during execution of a search warrant and suspiciously kept his hand in his overcoat pocket during police questioning); *State v. Howard*, 7 Wn. App. 668, 673–74, 502 P.2d 1043, 1046–47 (1972) (allowing frisk where defendant parked a car near a residence being searched, and officer had prior knowledge that defendant carried a concealed knife); *State v. Brooks*, 3 Wn. App. 769, 774–75, 479 P.2d 544, 548 (1970) (allowing frisk where defendant matched the description of a suspect who had fired shots at other officers moments before the stop).

Under certain circumstances, a search may be conducted pursuant to a *Terry* stop even in the absence of grounds for believing that the suspect is armed and dangerous. For example, a police officer may seize property from a suspect if the suspect's actions give rise to a reasonable suspicion that evidence of a crime is in danger of being destroyed or lost. *State v. Dorsey*, 40 Wn. App. 459, 472, 698 P.2d 1109, 1116 (1985) (deciding case in which an officer detaining a suspect for questioning about credit card theft observed the suspect shaking his coat so as to apparently dislodge an envelope from the coat pocket that could have contained credit cards). A pat-down search may also be reasonable when police are performing their "community caretaking" function. *See State v. Acrey*, 148 Wn.2d 738, 751, 64 P.3d 594, 601 (2003) (en banc) (holding community caretaking function exception to warrant requirement permitted officers to detain 12-year-old minor found on city street after midnight in area with no residences or open businesses while officers contacted minor's parent). *But cf. State v. Kinzy*, 141 Wn.2d 373, 391–92, 5 P.3d 668, 678–79 (2000) (en banc) (holding community caretaking exception to warrant requirement did not permit officers to detain a 16-year-old minor whom officers perceived to be between 11 and 13 years of age and found after 10 p.m. on a school night in a known drug-trafficking area associating with persons known to be involved with narcotics).

4.10(a) Scope of a Permissible Frisk

A frisk must be justified not only in its inception, but also in its scope. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160, 163 (1994) (en banc). The scope of a valid frisk is strictly limited to what is necessary for the discovery of weapons which might be used to harm the officer or others nearby. *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889, 911 (1968); *see also State v. Alcantara*, 79 Wn. App. 362, 366, 901 P.2d 1087, 1089 (1995) (holding that a search exceeded the scope of *Terry* stop because the officer gave no indication that the search was based on concerns for officer's safety); *cf. infra* §5.1 (discussing search incident to arrest). Pat-down searches are permitted if the police officer has reasonable grounds to believe that a suspect is armed and currently dangerous. *State v. Broadnax*, 98 Wn.2d 289, 296, 654 P.2d 96, 101 (1982) (en banc); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429, 431 (1980) (en banc). *See also State v. Samsel*, 39 Wn. App. 564, 573, 694 P.2d 670, 676 (1985) (holding that a frisk was reasonable when officers stopped suspects seen entering a taxicab in close spatial and temporal proximity to a robbery, the suspects matched the victim's description of the robbers, and, after stopping the taxicab, officers observed marijuana and a gun holster on the floor of the passenger compartment). A frisk need not conform to the conventional pat-down. *See Adams v. Williams*, 407 U.S. 143, 147–49, 92 S. Ct. 1921, 1923–24, 32 L. Ed. 2d 612, 617–18 (1972) (finding an officer was justified in reaching through a window and removing a revolver from the suspect's waistband when, after the officer had received information that a narcotics suspect was seated in a nearby car and carried a gun in his waistband, the first suspect refused to comply with the officer's request to step out of the car); *see also* 4 LaFave, *supra*, § 9.5(b), at 655; *supra* § 4.7(c)–(d).

A Washington court has upheld an officer's grab at a suspect's hand when the suspect furtively withdrew his hand from his pocket and thrust it behind his back. *State v. Serrano*, 14 Wn. App. 462, 469, 544 P.2d 101, 106 (1975). Although the court reasoned that the officer's reflexive action was not actually a search, the *Terry* principle that officers may act to protect themselves also justified the interference. *Id.*

While the scope of the search should be sufficient to assure the officer's safety, it should be strictly limited to the purpose for which it is permitted. *State v. Franklin*, 41 Wn. App. 409, 414, 704 P.2d 666, 670 (1985) (finding that a search of a suspect's tote bag was allowed when (1) an officer was informed that the suspect had a gun, (2) the officer immediately confronted the suspect, and (3) the suspect admitted that a weapon was in the tote bag). When in the course of a frisk an officer feels what may be a weapon, the officer may only take such action as is

necessary to examine the object. *Terry*, 392 U.S. at 30, 88 S. Ct. at 1884–85, 20 L. Ed. 2d at 911. Once police ascertain that no weapon is involved, their authority to conduct even a limited search ends. *Hudson*, 124 Wn.2d. at 113; *see also Hobart*, 94 Wn.2d at 446. *See generally* 4 LaFave, *supra*, § 9.6(c).

4.10(b) Frisks of Persons in Proximity to Suspect

Police may not frisk persons present on the premises of a place being lawfully searched absent a reasonable suspicion that such persons are armed. *See Ybarra v. Illinois*, 444 U.S. 85, 94, 100 S. Ct. 338, 343, 62 L. Ed. 2d 238, 247 (1979); *supra* § 3.8(a). Similarly, police may not take protective measures such as searching the purse of a vehicle's passenger when the driver is stopped on the basis of a traffic violation absent a reasonable suspicion that the passenger is involved in criminal conduct. *State v. Larson*, 93 Wn.2d 638, 641–42, 611 P.2d 771, 773–75 (1980) (en banc). *See also State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (en banc). When an officer makes a lawful investigative stop and has objective reasons for believing that there may be a weapon in the vehicle, the officer may make a limited search of the passenger compartment for weapons within the area of control of the suspect and of any other passenger in the vehicle. *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445, 451 (1986) (en banc). A passenger frisk is justified only when the officer is able to identify specific, articulable facts giving rise to an objectively reasonable belief that the passenger may be armed and dangerous. *State v. Horrace*, 144 Wn.2d 386, 399–400, 28 P.3d 753, 760 (2001) (en banc); *State v. McIntosh*, 42 Wn. App. 579, 582–83, 712 P.2d 323, 325 (1986) (upholding frisk where investigating officer noticed the driver was armed with a knife and saw a weapon-like object under front seat of car); *see also State v. Coahran*, 27 Wn. App. 664, 620 P.2d 116 (1980) (holding that a protective frisk of a passenger is permitted when the driver is lawfully stopped for reasons pertaining to handgun possession and threats of violence). One commentator suggests that the appropriate inquiry is whether the officer is under a reasonable apprehension of danger—a determination that depends on the nature of the crime, the time and place of the arrest, the number of officers and suspects, and whether the companion has made any threatening movements. *See* 4 LaFave, *supra*, § 9.5(a), at 636–37.

4.10(c) Protective Measures Other Than Frisks

An officer may take self-protective measures other than a frisk. For instance, a police officer may order a driver who has been validly stopped to get out of his or her car, regardless of whether the driver is

suspected of being armed or dangerous or whether the offense under investigation is a serious one. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 333, 54 L. Ed. 2d 331, 337 (1977) (noting that intrusion is de minimis while risks confronting an officer are substantial). *See also State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445, 451 (1986) (en banc). The Supreme Court later extended the *Mimms* rule to passengers of lawfully stopped vehicles. *Maryland v. Wilson*, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997). The Washington Supreme Court, however, declined to extend *Mimms* to passengers of the vehicle under Article I, Section 7 unless the officer has an objective reason based on safety concerns. *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722, 728 (1999) (en banc). *See* 4 LaFave, *supra*, § 9.6(a), at 646 n.155.

4.10(d) Search of Area: Measures Beyond Frisks

Officers may extend a *Terry* search for weapons to the passenger compartment of a detained person's vehicle when the police have a reasonable belief that the suspect is both dangerous and has easy access to a weapon in the vehicle. *Michigan v. Long*, 463 U.S. 1032, 1049–50, 103 S. Ct. 3469, 3481, 77 L. Ed. 2d 1201, 1220 (1983). *See also State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445, 451 (1986) (en banc) (upholding frisk where officer observed the suspect leaning forward as though to place something under seat while stopping suspect's vehicle for investigation of possible drug buy); *State v. McIntosh*, 42 Wn. App. 579, 582–84, 712 P.2d 323, 325 (1986) (finding a search appropriate when the driver of a vehicle was armed with a knife and a weapon-like object visibly protruded from under passenger seat); *Perez*, 41 Wn. App. at 486 (finding seizure of rifle reasonable when officer had reason to believe suspect was armed because officer could see from outside of the vehicle a piece of wood and what appeared to be a gun barrel covered by a jacket inside of the vehicle). A police officer may search a container carried by a suspect who is detained for questioning if the officer reasonably believes that the suspect possesses a weapon and the suspect has told the officer that a weapon is in the container. *See Franklin*, 41 Wn. App. at 415 (suspect carried a backpack). For a discussion of whether an officer may search items carried by a suspect, see generally 4 LaFave, *supra*, § 9.5(e).

However, police cannot search a car without a warrant incident to the arrest of a recent occupant unless the arrestee had ready access to the passenger compartment at the time of arrest. *State v. Rathbun*, 124 Wn. App. 372, 378, 101 P.3d 119 (2004) (holding that suspect was not in "immediate control" of the vehicle at the time of arrest when suspect had run 40 to 60 feet away from the vehicle); *State v. Johnston*, 107 Wn.

App. 280, 288, 28 P.3d 775, 779 (2001) (holding search illegal when two defendants were outside of the vehicle and two police officers were between the defendants and the car because defendants did not have "immediate control" of the passenger compartment); *cf. State v. Bradley*, 105 Wn. App. 30, 38, 18 P.3d 602, 607 (2001) (holding officers may search vehicle for weapons or destructible evidence if the vehicle was in the "immediate control" of the defendant just prior to the arrest).

CHAPTER 5:
WARRANTLESS SEARCHES AND SEIZURES: THE EXCEPTIONS TO THE WARRANT REQUIREMENT

5.0 INTRODUCTION

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576, 585 (1967) (footnotes omitted); *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513, 515 (2002); *see also Minnesota v. Dickerson*, 508 U.S. 366, 371–72, 113 S. Ct. 2130, 2135, 124 L. Ed. 2d 334, 343–44 (1993); *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564, 576 (1971).

The following sections examine the various exceptions to the warrant requirement, which, according to the United States Supreme Court, are to be "jealously and carefully drawn." *Florida v. White*, 526 U.S. 559, 568, 119 S. Ct. 1555, 1561, 143 L. Ed. 2d 748, 756 (1999); *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80, 84 (2004) (en banc). The burden of proof is on the State to show that a warrantless search or seizure falls within one of the exceptions to the Fourth Amendment warrant requirement. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594, 598 (2003). In addition, even when a search or seizure falls within one of the exceptions to the warrant requirement, the search or seizure may be invalid if it infringes upon other rights. *See, e.g., United States v. Sherwin*, 572 F.2d 196, 200 (9th Cir. 1977) (plain view seizure of photographs of sexual activity invalid; the officers' determination that photographs were obscene violated the First Amendment).

5.1 SEARCH INCIDENT TO ARREST

Police may conduct a warrantless search and seizure incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 762–63, 89 S. Ct. 2034, 2039–40, 23 L. Ed. 2d 685, 693–94 (1969). As the Court explained in *Chimel*:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

> And the area into which an arrestee might reach in order to grab a weapon or evidentiary item must, of course, be governed by a like rule. . . . There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.

Id.

The "search incident to arrest" exception to the warrant requirement applies only when (1) there was a valid arrest and (2) the search incident to the arrest was "restricted in time and place in relation to the arrestee and the arrest," as opposed to being "a wide-ranging exploratory, rummaging, ransacking" search. *State v. Smith*, 88 Wn.2d 127, 135, 559 P.2d 970, 974 (1977).

As the following sections demonstrate, Washington's search incident to arrest exception to the warrant requirement, although similar to the federal exception, is subject to a different analysis under the Washington Constitution than the analysis required under the Fourth Amendment.

5.1(a) Lawful Arrest

The criteria for a lawful arrest are discussed in Chapter 4, *supra*. If the arrest is invalid, then the search incident to the arrest is invalid as well. *State v. Hehman*, 90 Wn.2d 45, 50, 578 P.2d 527, 529 (1978); *State v. Terrazas*, 71 Wn. App. 873, 878, 863 P.2d 75, 78–79 (1993). If an arrest is lawful, then a search incident to that arrest is permissible. *State v. Pulfrey*, 120 Wn. App. 270, 274, 86 P.3d 790, 793 (2004), *review granted*, 152 Wn.2d 1021, 101 P.3d 108 (2004); *State v. Johnson*, 77 Wn. App. 441, 443, 892 P.2d 106, 108 (1995); *see also State v. White*, 129 Wn.2d 105, 112, 915 P.2d 1099, 1102–03 (1996) (a warrantless search is not presumed to be invalid under the Fourth Amendment if it is made incident to a lawful arrest); *State v. Stroud*, 106 Wn.2d 144, 164, 720 P.2d 436, 447 (1986). Even when an arrest is valid, however, a search is not properly "incident" to the arrest if the arrest is merely a pretext for conducting a search to obtain evidence of a different offense. *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833, 839 (1999)) (declin-

ing to follow federal law holding pretextual traffic stops as not violating the Fourth Amendment); *State v. Johnson*, 71 Wn.2d 239, 242–43, 427 P.2d 705, 707 (1967); *cf. State v. Carner*, 28 Wn. App. 439, 445, 624 P.2d 204, 208 (1981) (holding that a second body search was invalid when made after the decision to release the defendant and in retaliation for his remarks, even when the arrest and initial search were valid). *See infra* § 5.4(a) for discussion of the need for the search to be contemporaneous with the arrest.

Property seized incident to a lawful arrest may be used to prosecute the arrested person for a crime other than the one for which the person was initially arrested so long as the initial arrest was not merely a pretext to conduct a search for evidence of some other offense. *State v. Smith*, 119 Wn.2d 675, 681, 835 P.2d 1025, 1029 (1992) (finding that, after a lawful arrest for consuming liquor in public, drug paraphernalia was admissible when found in the defendant's fanny pack during the search); *cf. State v. Cormier*, 100 Wn. App. 457, 463, 997 P.2d 950, 954 (2000) (absent self-defense, evidence from a search of the defendant was admissible after the defendant's lawful arrest for assaulting an officer, even though the defendant assaulted the officer after being illegally stopped); *see also State v. Gammon*, 61 Wn. App. 858, 863, 812 P.2d 885, 888 (1991); *State v. LaTourette*, 49 Wn. App. 119, 127–29, 741 P.2d 1033, 1037–38 (1987); *State v. White*, 44 Wn. App. 276, 278, 722 P.2d 118, 119 (1986).

The search incident to arrest exception requires a custodial arrest. *See Hehman*, 90 Wn.2d at 50. In Washington, custodial arrest for minor traffic violations is generally not permitted. *See* RCW 46.64.015; *State v. Reding*, 119 Wn.2d 685, 689–90, 835 P.2d 1019, 1021–22 (1992). With limited exceptions, officers are required to cite and release motorists stopped for minor traffic offenses if the motorist gives a signed promise to appear in court. *See* RCW 46.64.015; *Reding*, 119 Wn.2d at 689–90. Moreover, officers explicitly lack authority to arrest after witnessing only a minor traffic infraction. RCW 46.63.020. Thus, a search is generally unlawful if it is incident to a stop for a minor traffic violation. *See Terrazas*, 71 Wn. App. at 875.

Police officers are authorized to make a custodial arrest for a traffic violation if: (1) the motorist refuses to sign a written promise to appear in court; (2) the violation is one of the "nonminor" traffic violations specifically designated in RCW 10.31.100; or (3) the motorist is a nonresident arrestee. *See* RCW 46.64.015(1)–(3). Absent one of these conditions, police need other reasonable grounds to arrest and conduct a valid search incident to arrest if a motorist is stopped for a "minor" traffic violation. *See Reding*, 119 Wn.2d at 691–92 (upholding custodial arrest for

the nonminor offense of reckless driving); *Terrazas*, 71 Wn. App. at 875–78 (an officer may arrest a defendant for driving without a valid driver's license only if facts suggest the defendant will not appear in court if cited and released). *But see State v. Barker*, 143 Wn.2d 915, 922, 25 P.3d 423, 426 (2001) (out-of-state trooper lacked statutory or common-law authority to arrest DUI suspect near state line in Washington, and existence of probable cause did not render the stop constitutionally valid).

5.1(b) "Immediate Control"

In determining whether the area searched or the object seized was within the "immediate control" of the defendant under the Fourth Amendment, courts have recognized that "there can be no hard and fast rule." *People v. Williams*, 57 Ill. 2d 239, 246, 311 N.E.2d 681 (1974). Factors that have been considered include the following: (1) whether the arrestee was physically restrained; (2) the position of the officer in relation to the defendant and the place searched; (3) the difficulty of gaining access into the container or enclosure searched; and (4) the number of officers present as compared with the number of arrestees or other persons. *See* 3 Wayne R. LaFave, *Search and Seizure* § 6.3(c), at 355–57 (4th ed. 2004); *see also id.* § 7.1(b), at 505–07. For the purposes of a search incident to an arrest, an object or container is considered to be within the control of an arrestee if the object was within the arrestee's reach immediately prior to arrest or at the moment of arrest. *Smith*, 119 Wn.2d at 681–82 (upholding search of a fanny pack that was within one or two steps of the defendant at the time of the arrest); *see also United States v. Turner*, 926 F.2d 883, 888 (9th Cir. 1991) (plastic baggies under arrestee's pillow were within immediate control of arrestee who was on the bed when he was arrested); *United States v. Andersson*, 813 F.2d 1450, 1455 (9th Cir. 1987) (closed suitcase on the bed next to arrestee searchable incident to arrest).

Under the Fourth Amendment, and in certain limited situations, some courts have permitted police to extend a search incident to an arrest in the home into an area that is beyond the arrestee's immediate control. If the police permit an arrestee to move into other rooms to gather clothing, for example, the police may accompany the arrestee and search the rooms and any areas, such as closets or bureau drawers, where the arrestee has been. *See* 3 LaFave, *supra*, § 6.4(a), at 363–65. Courts have also permitted police to search premises to determine whether accomplices who could aid the arrestee are present, see *id.* § 6.4(b), at 370, and to conduct a protective sweep of the premises when the officers fear that third parties may offer resistance, *id.* § 6.4(c), at 373–75. *See Maryland*

v. Buie, 494 U.S. 325, 333–36, 110 S. Ct. 1093, 1098–99, 108 L. Ed. 2d 276, 288 (1990).

Article I, Section 7 of the Washington Constitution places greater restraints on police than the Fourth Amendment does when an arrestee is in her home. Entry into rooms beyond the immediate control of the suspect requires that police have a reasonable fear for their safety or a belief that the arrestee is about to destroy evidence or escape. *State v. Chrisman*, 100 Wn.2d 814, 815, 821, 676 P.2d 419, 421, 423 (1984) (holding on remand that, although the United States Supreme Court held that a warrantless entry into and search of the dormitory room of two college students did not violate the Fourth Amendment, *Washington v. Chrisman*, 455 U.S. 1, 7, 102 S. Ct. 812, 817, 70 L. Ed. 2d 778, 785 (1982), the entry and search did violate Article I, Section 7 of the Washington Constitution); *see also State v. Boyer*, ___ Wn. App. ___, ___, 102 P.3d 833, 838 (2004) (protective sweep of basement rooms that belonged to an upstairs apartment not justified when search was done incident to execution of a search warrant for a basement apartment); *cf. State v. McKinney*, 49 Wn. App. 850, 857, 746 P.2d 835, 839 (1987) (finding a warrantless entry into a home justified by the risk that the suspect identified in a search warrant might escape); *cf.* 3 LaFave, *supra*, § 6.3(c), at 358, 6.4(a)–(c), at 363–87, 7.1(b), at 507.

For a discussion of automobile searches incident to arrest, *see infra* § 5.2(b).

5.2 IMMEDIATE CONTROL OR PERMISSIBLE SCOPE: PARTICULAR APPLICATIONS

5.2(a) The Defendant

Under the Fourth Amendment, an officer may search an arrestee who has been taken into custody even when the officer does not believe that the arrestee is armed or in possession of evidence of the crime for which the suspect was arrested. *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 477, 38 L. Ed. 2d 427, 440–41 (1973). The lawful arrest establishes the authority to search the arrestee; the arresting officer need not have a subjective fear that an arrestee is armed or will destroy evidence. *Gustafson v. Florida*, 414 U.S. 260, 263–64, 94 S. Ct. 488, 491, 38 L. Ed. 2d 456, 460 (1973). The rule applies even when the custodial arrest follows a stop for a minor traffic violation, unless such an arrest would be illegal. *Robinson*, 414 U.S. at 235, 94 S. Ct. at 477, 38 L. Ed. 2d at 440–41; *see State v. Reding*, 119 Wn.2d 685, 691–92, 835 P.2d 1019, 1022–23 (1992); *cf. Knowles v. Iowa*, 525 U.S. 113, 118–19, 119 S. Ct. 484, 488, 142 L. Ed. 2d 492, 499 (1998) (declining to extend *Rob-*

inson's search incident to arrest rule when officer only gave a citation for speeding and did not arrest).

Under Article I, Section 7 of the Washington Constitution, an arrestee's diminished expectation of privacy permits an officer to search an arrestee's clothing, including small containers found on the arrestee. *State v. Smith*, 119 Wn.2d 675, 681–82, 835 P.2d 1025, 1029 (1992) (upholding search of fanny pack following lawful arrest); *State v. Gammon*, 61 Wn. App. 858, 864, 812 P.2d 885, 888 (1991) (upholding search of prescription pill bottle found on defendant following lawful arrest); *State v. White*, 44 Wn. App. 276, 278, 722 P.2d 118, 119–20 (1986) (upholding police examination of cosmetic case found in arrestee's coat pocket). In addition, an arrestee does not have to be in actual physical possession of a container at the time of the search, so long as the container is within the arrestee's reach. *Smith*, 119 Wn.2d at 681; *Gammon*, 61 Wn. App. at 863–64. A greater expectation of privacy is extended to possessions that are not closely related to the person's clothing, such as "purses, briefcases[,] or luggage," and some additional reason must be present to justify the search of those items. *White*, 44 Wn. App. at 279; *see also State v. Kealey*, 80 Wn. App. 162, 170, 907 P.2d 319, 324 (1995) (stating that "a purse is inevitably associated with an expectation of privacy"). For a discussion of the search of purses in conjunction with automobile searches, *see infra* § 5.2(b).

Evidence seized pursuant to the search of an arrestee's person does not need to relate to the crime for which the defendant was arrested, nor must the grounds for the initial search encompass the evidence seized. *See Smith*, 119 Wn.2d at 681 (allowing admission of drug paraphernalia found in a fanny pack during a search subsequent to a lawful arrest for consuming liquor in public); *see also Gammon*, 61 Wn. App. at 863; *State v. LaTourette*, 49 Wn. App 119, 127–28, 741 P.2d 1033, 1037–38 (1987); *White*, 44 Wn. App. at 278.

An intrusion into a suspect's body, such as by drawing blood samples, is a search and seizure under Article I, Section 7 and the Fourth Amendment and therefore is not justifiable under the search incident to arrest exception to the warrant requirement. *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 917 (1966); *State v. Dunivin*, 65 Wn. App. 501, 507, 828 P.2d 1150, 1154 (1992). However, such intrusions may be justified by the exigent circumstances exception. *Schmerber*, 384 U.S. at 770–71, 86 S. Ct. at 1835–36, 16 L. Ed. 2d at 919–20; *see generally infra* § 5.18(a) and *supra* § 3.13(b); 3 Wayne R. LaFave, *Search and Seizure* § 5.3(c), at 171–72 (4th ed. 2004). In Washington, bodily intrusions are authorized by statute in order to allow

police to take blood tests of motorists arrested for certain serious traffic violations. RCW 46.20.308(3).

Less intrusive physical measures are permissible, such as a chokehold intended to prevent a suspect from swallowing apparent contraband. *See State v. Taplin*, 36 Wn. App. 664, 666–67, 676 P.2d 504, 506 (1984); *State v. Williams*, 16 Wn. App. 868, 871–72, 560 P.2d 1160, 1163 (1977). Officers attempting to prevent a suspect from swallowing evidence may not, however, prevent the suspect from breathing or obstruct the suspect's blood supply to the head, although they may pinch his mouth shut. *Williams*, 16 Wn. App. at 872. More aggressive conduct, such as jumping on the suspect, is likely to violate due process rights. *Id.* at 870; *see Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 209–11, 96 L. Ed. 183, 190 (1952); *see generally* 3 LaFave, *supra*, § 5.2(i). For a brief discussion of post-detention body searches, *see infra* § 6.2(d).

5.2(b) Vehicles and Containers

Under both Article I, Section 7 and the Fourth Amendment, police may search the passenger compartment of an automobile as a search incidental to the arrest of an occupant. *New York v. Belton*, 453 U.S. 454, 460–62, 101 S. Ct. 2860, 2864–65, 69 L. Ed. 2d 768, 775–76 (1981); *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436, 441 (1986); *see also State v. Vrieling*, 144 Wn.2d 489, 496, 28 P.3d 762, 766 (2001) (search of the inside rear of pulled-over motor home valid when incidental to arrest of its driver); *State v. Hill*, 68 Wn. App. 300, 308, 842 P.2d 996, 1000 (1993) (search of passenger compartment incidental to arrest of passenger was valid). Known as the *Belton* rule, the passenger compartment is considered within the arrestee's immediate control under the Fourth Amendment, even after the arrestee has been placed in police custody. *Belton*, 453 U.S. at 460, 101 S. Ct. at 2864, 69 L. Ed. 2d at 774; *see also Thornton v. United States*, 541 U.S. 615, ___, 124 S. Ct. 2127, 2132, 158 L. Ed. 2d 905, 915 (2004) (holding that the *Belton* rule is not confined to situations in which the police initiate contact with the occupant of a vehicle while that person is in the vehicle; the rule also reaches persons who were recent occupants).

Under Article I, Section 7, a passenger compartment search incidental to arrest must take place "immediately subsequent" to the suspect's arrest and placement in the police car. *State v. Fladebo*, 113 Wn.2d 388, 395–97, 779 P.2d 707, 712 (1989); *Stroud*, 106 Wn.2d at 152; *State v. Cass*, 62 Wn. App. 793, 795–97, 816 P.2d 57, 58–59 (1991); *see generally State v. Rankin*, 151 Wn.2d 689, 697, 92 P.3d 202, 206 (2004) (explaining that, under Article I, Section 7, "a mere request for identification from a passenger in an automobile for investigatory

purposes constitutes a seizure unless there is a reasonable basis for the inquiry"). When a subject has stepped out of a vehicle during a lawful investigative stop, the officer may make a limited search of the passenger compartment for weapons within the area of the suspect's control and within the control of any other passenger in the vehicle if the police officer has objective reasons for believing that there may be a weapon in the vehicle. *State v. Kennedy*, 107 Wn.2d 1, 12–13, 726 P.2d 445, 451–52 (1986) (finding that a limited search was justified after an officer saw the defendant lean forward as if putting something under the seat); *State v. Larson*, 88 Wn. App. 849, 850–51, 857, 946 P.2d 1212, 1214, 1216 (1997) (concern for officer safety supported a limited search of a driver's vehicle when an officer previously saw furtive movements by the driver, and the driver would have to return to his truck in order to obtain registration).

Even when officers initially have an objective reason to be concerned for their safety, events during the course of an investigation may negate an objectively reasonable belief that the suspect is armed and dangerous. *State v. Glossbrener*, 146 Wn.2d 670, 684, 49 P.3d 128, 135 (2002). In *Glossbrener*, an officer pulled over a vehicle because of a broken headlight and noticed the driver reach down toward the passenger side of the car for several seconds before coming to a complete stop. *Id.* at 673. When the officer approached the lone driver, the officer smelled alcohol and noticed the driver's bloodshot eyes. *Id.* When asked if he had been hiding any weapons, the driver said he had reached over to hide an alcohol container. *Id.* The officer then told the driver to stay in the car while the officer checked for warrants. *Id.* at 674. After finding no warrants, the officer conducted a sobriety test and a pat-down that revealed no weapons. *Id.* The court noted that it was not until the officer had completed his investigation and determined that the driver was not legally intoxicated that he decided to call for backup in order to search the vehicle's passenger area where he had seen the driver reach. *Id.* at 682. The court held that, under the circumstances of the officer's own investigation, he did not have an objectively reasonable belief that he was in danger. *Id.* The court distinguished other cases where officers conducted the searches "at the first opportunity after the officer observed the furtive movement." *Id.* at 683 (discussing *State v. Horrace*, 144 Wn.2d 386, 388, 28 P.3d 753, 754 (2001); *State v. Watkins*, 76 Wn. App. 726, 728, 887 P.2d 492, 493 (1995); *State v. Wilkinson*, 56 Wn. App. 812, 813, 785 P.2d 1139, 1140 (1990); *cf. State v. Jones*, 146 Wn.2d 328, 338, 45 P.3d 1062, 1067 (2002).

The justification for a warrantless search incident to an arrest is lost if the defendant is removed from the scene. *State v. Boyce*, 52 Wn. App.

274, 277–78, 758 P.2d 1017, 1018–19 (1988). When a suspect is arrested outside of the vehicle, "the proper inquiry is whether the vehicle was within the arrestee's immediate control 'at the time the police initiate an arrest'—not whether the arrestee had control over the vehicle at some point prior to his or her arrest." *State v. Rathbun*, 124 Wn. App. 372, 378, 101 P.3d 119, 121 (2004). In *Rathbun*, police initially saw the suspect standing beside the open doors of his truck, but by the time they initiated the arrest, the suspect had run about 40 to 60 feet away from the truck and jumped over a fence. *Id.* Holding that a search of the defendant's truck incident to his arrest was illegal, the court reasoned that the suspect did not have the opportunity to destroy evidence or obtain a weapon from within the truck when he was at least 40 feet away and the warrant for the suspect's arrest had no connection to his truck. *Id.*; *see also State v. Johnston*, 107 Wn. App. 280, 288, 28 P.3d 775, 779 (2001) (invalid vehicle search where defendants, whom witnesses reported seeing in the car earlier during an armed robbery, walked past a police officer standing near the car before being arrested "in the immediate vicinity"); *State v. Wheless*, 103 Wn. App. 749, 755–56, 14 P.3d 184, 188 (2000) (search not properly incident to arrest because of a lack of physical proximity between tavern bathroom, where arrest took place, and tavern parking lot, where search took place).

Under the Fourth Amendment, any containers in the passenger compartment may be searched, whether the containers are locked or unlocked. *Belton*, 453 U.S. at 460–61, 101 S. Ct. at 2864, 69 L. Ed. 2d at 768; *cf. Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 889, 157 L. Ed. 2d 843, 851 (2004) ("The Fourth Amendment does not treat a motorist's car as his castle."); *Wyoming v. Houghton*, 526 U.S. 295, 303, 119 S. Ct. 1297, 1302, 143 L. Ed. 2d 408, 416 (1999) (explaining that, under the Fourth Amendment, both passengers and drivers possess a reduced expectation of privacy while in automobiles).

Under Article I, Section 7, the search may not include any locked containers, including a locked glove compartment. *Vrieling*, 144 Wn.2d at 492 n.1 (explaining how *Fladebo*, 113 Wn.2d 388, resolved, by agreeing with the lead, non-majority opinion in *Stroud*, 106 Wn.2d at 144, the question of whether locked containers may be searched); *Stroud*, 106 Wn.2d at 152. The lawful scope extends to "all space reachable without exiting the vehicle," including the "zipped, 'unlocked' cushion" containing a gun in the back of a motor home accessible to the occupants when the motor home was on the road. *Vrieling*, 144 Wn.2d at 496 (noting that a different question may be presented when a motor home serves as a fixed residence); *see also State v. Johnson*, 77 Wn. App. 441, 444–45, 892 P.2d 106, 108 (1995) (citing 3 Wayne R. LaFave, *Search and Sei-*

zure § 7.1(c), at 16 (1987) (sleeper compartment of a tractor-trailer rig considered part of passenger compartment); *State v. Kypreos*, 115 Wn. App. 207, 216, 61 P.3d 352, 357 (2002) (a fifth-wheel trailer located on private property unattached to a motorized vehicle is not subject to the automobile exception); *State v. Davis*, 79 Wn. App. 355, 360–62, 901 P.2d 1094, 1097–98 (1995).

At a minimum, the "personal effects of a passenger, such as a purse[,] jacket, or container, known to the officers to belong to the passenger, may not be searched incident to the arrest of the driver if not in the 'immediate control' of the driver." *Vrieling*, 144 Wn.2d at 494, n.2 (explaining *State v. Parker*, 139 Wn.2d 486, 987 P.2d 73 (1999) (en banc), by analyzing the lead opinion together with the narrowing concurring-dissenting opinion, where none of the analytical approaches garnered a majority vote); *Jones*, 146 Wn.2d at 338. *But see State v. Jackson*, 107 Wn. App. 646, 650, 27 P.3d 689, 691 (2001) (holding that police may lawfully assume that items of confused ownership are lawfully subject to inspection where driver and passenger both claimed ownership of jacket in car).

Police may legally retrieve and search voluntarily abandoned property. *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200, 204 (2001). However, they may not seize property found in a location where a third party gave consent to search if police caused that property to be abandoned via an unlawful seizure of the property's owner. *State v. Reichenbach*, 153 Wn.2d 126, 136, 101 P.3d 80, 87 (2004) (en banc). Note that the valid arrest of a driver does not justify the warrantless search of a passenger's purse where the purse is on the passenger's person and the passenger is outside the vehicle, unless police have some articulable suspicion that criminal conduct has occurred or is about to occur. *State v. Seitz*, 86 Wn. App. 865, 869, 941 P.2d 5, 8 (1997). Similarly, the valid arrest of a passenger does not justify the warrantless search of the driver's purse left in the car when police direct the driver to exit the car without her purse, although they did not believe she presented any danger. *State v. Nelson*, 89 Wn. App. 179, 183, 948 P.2d 1314, 1316 (1997).

The locked trunk of an automobile that is inaccessible from the interior of the car is not considered part of the passenger compartment; therefore, a search warrant is required to conduct a lawful search of the locked trunk. *See Belton*, 453 U.S. at 460 n.4, 101 S. Ct. at 2684 n.4, 69 L. Ed. 2d at 775 n.4 (stating that the "interior of the passenger compartment . . . does not encompass the trunk"); *Davis*, 79 Wn. App. at 361. Federal courts have interpreted "passenger compartment" to encompass the hatch area of a hatchback automobile. *See, e.g., United States v. Doward*, 41 F.3d 789, 793 (1st Cir. 1994). The engine compartment is

not considered to be part of the passenger compartment and cannot be searched without a warrant under the search incident to arrest exception. *State v. Mitzlaff*, 80 Wn. App. 184, 188, 907 P.2d 328, 330 (1995).

When police have probable cause to believe that an automobile contains contraband or evidence, they may have authority to search the vehicle without a warrant pursuant to one of the other exceptions to the warrant requirement, whether or not they have probable cause to arrest the vehicle's occupants. *See generally infra* §§ 5.21–.23. Under the Fourth Amendment, the police may search any container located within an automobile if they have probable cause to believe that the container itself holds contraband, even if they lack probable cause to search the vehicle as a whole. *California v. Acevedo*, 500 U.S. 565, 573, 111 S. Ct. 1982, 1988, 114 L. Ed. 2d 619, 630 (1991). In order to provide the necessary added protection guaranteed by Article I, Section 7, however, the court will require "virtual certainty that the container, in the circumstances viewed, holds contraband, as if transparent." *State v. Courcy*, 48 Wn. App. 326, 332, 739 P.2d 98, 102 (1987) (during a lawful *Terry* stop, *see supra* § 2.9(b), an officer viewed a precisely folded paper "bindle," commonly used to package cocaine, in the suspect's identification folder; the officer was justified in seizing the bindle and opening it). However, an automobile occupant does not have a legitimate expectation of privacy in property viewed through a vehicle window and such objects may fall within the "open view" or "plain view" warrant exceptions. *State v. Ozuna*, 80 Wn. App. 684, 689–90, 911 P.2d 395, 399 (1996); *State v. Gonzales*, 46 Wn. App. 388, 397, 731 P.2d 1101, 1107 (1986).

5.3 PRE-ARREST SEARCH

If a warrantless search is closely related in time and place to a lawful arrest, the search may be considered incidental to the arrest and valid as long as probable cause to arrest exists at the time of the search, even if the search occurs before the arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 2564, 65 L. Ed. 2d 633, 645–46 (1980); *State v. Smith*, 88 Wn.2d 127, 138, 559 P.2d 970, 975 (1977); *State v. Harrel*, 83 Wn. App. 393, 400, 923 P.2d 698, 702 (1996). If probable cause does not exist at the time of the search, a search that provides probable cause is not considered a valid search incidental to the arrest. *Smith v. Ohio*, 494 U.S. 541, 543, 110 S. Ct. 1288, 1290, 108 L. Ed. 2d 464, 467–68 (1990) (the warrantless search of the defendant's paper bag could not be justified as a search incidental to the arrest when the bag contained drug paraphernalia and the search was followed by the arrest of the defendant for drug abuse); *see generally* 3 Wayne R. LaFave, *Search and Seizure* § 5.5(a) (4th ed. 2004).

Under limited circumstances, pre-arrest searches are permitted even when the arrest does not closely follow the search. A search may be considered incidental to the arrest of a suspect in the following circumstances: (1) the police have probable cause; (2) the police believe the suspect is in the process of destroying highly evanescent evidence; and (3) the evidence can be preserved by a limited search. *Cupp v. Murphy*, 412 U.S. 291, 296, 93 S. Ct. 2000, 2004, 36 L. Ed. 2d 900, 906 (1973). *See generally* 3 LaFave, *supra*, § 5.4(b); *Smith*, 88 Wn.2d at 137–38 (upholding an officer's seizure of evidence prior to arrest because of exigent circumstance of its possible destruction). Pre-arrest searches are *Terry* searches, *see supra* § 2.9(b), and should be subject to the same standard applied and discussed *supra* §§ 4.5–.9.

5.4 POST-DETENTION SEARCHES: SEARCHES INCIDENT TO ARREST AND INVENTORY SEARCHES

5.4(a) Post-Detention Searches Incident to Arrest

The search incident to arrest exception can apply to a search at both the place of detention as well as the place of arrest. *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 5.3(a) (4th ed. 2004). However, a significant delay between the arrest and the search will render the search unreasonable, since the search is no longer contemporaneous with the arrest. *State v. Smith*, 119 Wn.2d 675, 683, 835 P.2d 1025, 1030 (1992) (delay of 17 minutes between arrest and search of a fanny pack was not unreasonable under the circumstances). Whether a delay is sufficient to render a search unreasonable and no longer valid under the search incident to arrest exception depends on the facts of the individual case. *Id.* at 683 n.4; *see State v. Boursaw*, 94 Wn. App. 629, 635, 976 P.2d 130, 134 (1999) (search reasonable where there was only a 10-minute delay between arrest and arrival of dog that completed search by sniffing behind vehicle's ashtray; holding is limited to facts of this case, and delays caused by a request for assistance might be unreasonable under different circumstances); *cf. State v. McKenna*, 91 Wn. App. 554, 564, 958 P.2d 1017, 1022 (1998) (holding search not reasonably contemporaneous to a noncustodial arrest because the arrest ended before search occurred); *State v. Radka*, 120 Wn. App. 43, 50, 83 P.3d 1038, 1041 (2004) (search of vehicle not valid as incidental to arrest because driver's detention was noncustodial as evidenced from the fact that deputy did not frisk driver or place him in handcuffs and deputy allowed him to make cell telephone calls from back of patrol car, presumably to arrange transportation).

Any post-arrest search is unlawful if probable cause to arrest dissipates by the time the suspect is taken into custody. *See State v. Hehman*, 90 Wn.2d 45, 50, 578 P.2d 527, 529 (1978) (holding that if the arrest is invalid, then the search incident to the arrest is invalid); *State v. Lemus*, 103 Wn. App. 94, 105, 11 P.3d 326, 332 (2000) (invalid search of vehicle when no probable cause existed to arrest driver prior to police performing positive field test of cocaine powder seen in car).

Under the Fourth Amendment and Article I, Section 7 of the Washington Constitution, when an arrestee is searched upon booking, officers may later conduct a warrantless "second look" into the arrestee's belongings. *United States v. Edwards*, 415 U.S. 800, 805, 94 S. Ct. 1234, 1238, 39 L. Ed. 2d 771, 777 (1974) (a search of the defendant's personal belongings long after the defendant had been searched and placed in a jail cell was a permissible search incident to an arrest); *State v. Cheatam*, 150 Wn.2d 626, 642, 81 P.3d 830, 838 (2003) (holding that once police have conducted a valid inventory search of an inmate's clothing and other effects at booking and have placed them in storage for safekeeping in accord with a proper inventory procedure, the inmate has lost any privacy interest in those items). *See* 3 LaFave, *supra*, § 5.3(b), at 159 (explaining that *Edwards* requires that a valid "second look" into the arrestee's inventoried belongings meet the following criteria: (1) The object seized must come into plain view at the time of arrival at the place of detention; (2) the later investigation must establish that the object has evidentiary value; and (3) the object must remain in police custody as part of the arrestee's inventoried property).

A difficult question arises when a suspect is detained only because the police have failed to comply with laws allowing release. *See generally* 3 LaFave, *supra*, § 5.3(d). A search conducted after police have decided to release a suspect is improper when there is no probability that the suspect possesses relevant evidence or weapons. *State v. Carner*, 28 Wn. App. 439, 445, 624 P.2d 204, 207–08 (1981). Similarly, courts have not validated a search based on consent from someone who was illegally detained. *State v. Avila-Avina*, 99 Wn. App. 9, 14–15, 991 P.2d 720, 724 (2000); *State v. O'Day*, 91 Wn. App. 244, 253, 955 P.2d 860, 865 (1998).

5.4(b) Post-Detention Inventory Search

Under the Fourth Amendment and Article I, Section 7, police officers may search containers or packages as part of an inventory of the arrestee's possessions prior to storing the items for safekeeping. *Illinois v. Lafayette*, 462 U.S. 640, 643–48, 103 S. Ct. 2605, 2608–09, 77 L. Ed. 2d 65, 69–71 (1983); *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190, 194

(1994). These "caretaking procedures" are constitutionally permissible under the Fourth Amendment's standard of "reasonableness." *South Dakota v. Opperman*, 428 U.S. 364, 369–70, 96 S. Ct. 3092, 3097–98, 49 L. Ed. 2d 1000, 1005–06 (1976). However, police must have probable cause to conduct a warrantless search of containers found in vehicles. *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408, 415 (1999); *California v. Acevedo*, 500 U.S. 565, 579, 111 S. Ct. 1982, 1991, 114 L. Ed. 2d 619, 634 (1991) (overruling previous holding in *United States v. Chadwick*, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), that probable cause was not required to conduct a warrantless search of containers in vehicles). An inventory search that is "a ruse for a general rummaging in order to discover incriminating evidence" is unreasonable. *Florida v. Wells*, 495 U.S. 1, 4, 110 S. Ct. 1632, 1635, 109 L. Ed. 2d 1, 6 (1990); *see also State v. Mireles*, 73 Wn. App. 605, 612, 871 P.2d 162, 165–66 (1994). The police have some obligation to safeguard the container and its contents when they seize it. *See Chadwick*, 433 U.S. at 19, 97 S. Ct. at 2487, 53 L. Ed. 2d at 553.

Whether the defendant is arrested in a private or public place is significant when determining if police will be able to conduct a warrantless inventory search. *Id.* (when a person is arrested in a public place, it is reasonable for police to take custody of the arrestee's property rather than to leave the property in the public place while a warrant is obtained). *See* 3 LaFave, *supra*, § 5.5(b), at 220–23.

Consistent with the greater protection provided under Article I, Section 7, inventory searches in Washington must be conducted "in good faith for the purposes of (1) finding, listing, and securing from loss during detention property belonging to a detained person; (2) protecting police from liability due to dishonest claims of theft; and (3) protecting temporary storage bailees against false charges." *Smith*, 76 Wn. App. at 16; *see also State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218, 1225 (1980); *State v. Gluck*, 83 Wn.2d 424, 428, 518 P.2d 703, 706–07 (1974). Search of a defendant's purse upon arrival at jail has been upheld under Article I, Section 7. *Smith*, 76 Wn. App. at 15–16. *But see State v. Smith*, 56 Wn. App. 145, 150–52, 783 P.2d 95, 98–99 (1989) (holding that a booking search of an arrestee's purse was unlawful because she was not given timely opportunity to post bail, and police apparently were not concerned that she was carrying weapons); *State v. Dugas*, 109 Wn. App. 592, 599, 36 P.3d 577, 581 (2001) (concluding that while police could inventory arrestee's jacket left on a hood of a car at the scene, they could not search the closed container in the jacket when there was no indication of dangerous contents; searching for illegal drugs is outside the scope of a valid inventory search). *See generally* 3 LaFave, *supra*, § 5.5(b).

Under both the Fourth Amendment and Article I, Section 7, the police may conduct an inventory search of a validly impounded automobile. Containers discovered during the inventory search may be opened without a warrant. *See Colorado v. Bertine*, 479 U.S. 367, 374–75, 107 S. Ct. 738, 742–43, 93 L. Ed. 2d 739, 747–48 (1987); *State v. McFadden*, 63 Wn. App. 441, 448, 820 P.2d 53, 56 (1991), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 640, 965 P.2d 1072, 1077 (1998); *see also infra* § 5.28.

5.5 SEARCHES CONDUCTED IN GOOD FAITH AND WITHOUT PURPOSE OF FINDING EVIDENCE: COMMUNITY CARETAKING AND MEDICAL EMERGENCY

If officers undertake a search in good faith for a reason other than investigating a crime—for example, when it is necessary for police to aid or assist, or when making routine checks on health and safety—any evidence they discover may be admissible under the Fourth Amendment. *See State v. Thompson*, 151 Wn.2d 793, 802–03, 92 P.3d 228, 232–33 (2004) (concluding that a police officer's entry into defendant's home to retrieve a guest's jacket was not justified by the community caretaking function); 3 Wayne R. LaFave, *Search and Seizure* § 5.5(d), at 240 (4th ed. 2004). A limited invasion of constitutionally protected privacy rights is allowed for "community caretaking" only if:

> (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns;
>
> (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and
>
> (3) there was a reasonable basis to associate the need for assistance with the place being searched.

Id. (citation omitted).

"Whether an encounter made for noncriminal noninvestigatory purposes is reasonable depends on a balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" *Thompson*, 151 Wn.2d at 802 (quoting *Kalmas v. Wagner*, 133 Wn.2d 210, 216–17, 943 P.2d 1369, 1372 (1997)). Thus, even when police lack probable cause to believe a crime has been committed, they may conduct a warrantless search of the premises when the premises contain the following: (1) persons in imminent danger of death or harm; (2) objects likely to burn, explode, or otherwise cause harm; or (3) information that will disclose the location of a threatened victim or the existence of such a threat. *State v.*

Downey, 53 Wn. App. 543, 545, 768 P.2d 502, 504 (1989); *cf. State v. Menz*, 75 Wn. App. 351, 353–56, 880 P.2d 48, 49–50 (1994) (police entry was justified when in response to a domestic violence call). *But see State v. Schlieker*, 115 Wn. App. 264, 272, 62 P.3d 520, 524 (2003) (despite some evidence that supported the community caretaking exception, officers responding to domestic violence call at house did not meet the exception when they failed to inquire about the defendants' safety in a trailer located on the property after the residents of the house told officers about alleged drug activity in the trailer prior to search). *See generally* 3 LaFave, *supra*, § 5.5(d). The officer's warrantless entry must be motivated by a need to render assistance and must not be merely a pretext for obtaining evidence that would otherwise be unavailable. *State v. Gibson*, 104 Wn. App. 792, 799, 17 P.3d 635, 639 (2001); *State v. Angelos*, 86 Wn. App. 253, 255, 936 P.2d 52, 53 (1997); *State v. Gocken*, 71 Wn. App. 267, 275, 857 P.2d 1074, 1080 (1993). Consequently, the officer must be able to articulate specific facts and reasonable inferences drawn therefrom that justify the warrantless entry. *State v. Davis*, 86 Wn. App. 414, 420, 937 P.2d 1110, 1114 (1997) (entry was proper when, after check-out time, the motel occupant did not respond to repeated telephone calls and knocks at the door).

When determining whether police have intruded beyond their scope of community caretaking in trying to protect children, courts have considered circumstances beyond the fact that a minor is found out late at night. *See State v. Acrey*, 148 Wn.2d 738, 64 P.3d 594 (2003); *State v. Kinzy*, 141 Wn.2d 373, 5 P.3d 668 (2000). In *Kinzy*, police stopped a 16-year-old girl after seeing her walking on a downtown Seattle sidewalk at about 10 p.m. on a weeknight with an adult male the officer knew to be involved with narcotics. *Id.* at 378. When Kinzy tried to walk away, the officer physically detained her and a later search revealed cocaine. *Id.* The court held that, under the community caretaking exception, police could approach Kinzy and ask if she needed help, but without articulable suspicion that she had committed a criminal offense, they could not physically detain her when she chose to walk away. *Id.* at 395. In *Acrey*, police responded to a citizen's 911 call on a weeknight reporting fighting, and found five young boys, including the 12-year-old Acrey, out after midnight in an isolated area with no adult supervision. 148 Wn.2d at 742–43. Police contacted Acrey's mother, who asked police to give the boy a ride home. *Id.* at 743. Before transporting the boy in the police car, police conducted a pat-down frisk for safety purposes and found drugs. *Id.* at 743. The court affirmed the appellate court's holding that there was reason for heightened concern that the boys may be engaging in conduct that could bring harm to themselves or others, and that the

police acted reasonably. *Id.* at 751. The court agreed with how the appeals court distinguished *Kinzy*:

> Acrey was younger than Kinzy, and the hour much later; Acrey was in an isolated area unaccompanied by an adult; and most important, the officers had initially detained Acrey to investigate a possible crime. The fact that a 911 call had been placed raised at least some degree of concern for Acrey's well-being, regardless of whether there was any criminal activity . . . . Perhaps most important, the fact that Acrey had been legitimately detained in a *Terry* stop meant that there was merely a momentary additional intrusion for community caretaking purposes.

Id. at 752.

Police may make a warrantless entry into a residence in response to a report of domestic violence under the emergency exception. *Menz*, 75 Wn. App. at 353. "Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants" of a residence. *State v. Raines*, 55 Wn. App. 459, 465, 778 P.2d 538, 542 (1989).

When the medical emergency is a homicide, officers may not only enter to aid the victim, but they may also make a quick check to see if the perpetrator or other victims are present. *See Flippo v. West Virginia*, 528 U.S. 11, 14, 120 S. Ct. 7, 15, 145 L. Ed. 2d 16, 20 (1999) (noting that, while officers may enter a murder scene to aid victims or to see if the perpetrator is present, there is no general "murder scene" warrant exception); *Thompson v. Louisiana*, 469 U.S. 17, 21, 105 S. Ct. 409, 411, 83 L. Ed. 2d 246, 251 (1984) (same); *State v. Stevenson*, 55 Wn. App. 725, 729–30, 780 P.2d 873, 876 (1989). Thus, any evidence observed in plain view during the course of legitimate police emergency activities at the scene may be seized. *Id.* at 730. Any such search must be brief; a general exploratory search lasting several hours is not permissible. *Thompson*, 469 U.S. at 21, 105 S. Ct. at 411, 83 L. Ed. 2d at 251; *cf. supra* § 5.1(b).

In the course of rendering aid, police may conduct a warrantless search of a victim's personal effects so long as the search is motivated by a need to render assistance. *State v. Loewen*, 97 Wn.2d 562, 568, 647 P.2d 489, 493 (1982) (the search of the defendant's tote bag for identification was improper when the defendant regained consciousness prior to the search); *see also Chavis v. Wainwright*, 488 F.2d 1077, 1078 (5th Cir. 1973) (police justified in making an inventory search of the defendant's clothing and effects when removed in the hospital during the defendant's treatment and when police were required to keep the clothing and effects as evidence of possible homicide); *United States v. Dunavan*, 485 F.2d 201, 203 (6th Cir. 1973) (when taking persons to the hospital,

police may search their briefcases for the purpose of establishing identity); *cf. State v. Dempsey*, 88 Wn. App. 918, 922, 947 P.2d 265, 268–69 (1997) (a search associated with emergency civil commitment was justified under the emergency exception; the scope of the search may extend to whatever is reasonable to conduct the caretaking function). *But see Loewen*, 97 Wn.2d at 568 (necessity must exist at time of search); *State v. Schroeder*, 109 Wn. App. 30, 45, 32 P.3d 1022, 1029 (2001) (searching coat pocket for identification where the coat was located in a different room from suicide victim was beyond scope of community caretaking function of waiting at the scene for coroner after the grief-stricken cohabitant of the premises left with police chaplain to go to a friend's house).

Similarly, police may make a warrantless entry to protect property, and in so doing police may seize evidence within their plain view. *State v. Bakke*, 44 Wn. App. 830, 839–41, 723 P.2d 534, 538–40 (1986) (police may make a warrantless entry into a private residence in response to a reported burglary and may then seize contraband within their plain view); *State v. Campbell*, 15 Wn. App. 98, 100, 547 P.2d 295, 297 (1976) (police entry to investigate alleged burglary permissible). Firefighters may enter a house to extinguish a fire and immediately thereafter conduct a limited warrantless investigation to determine the fire's cause. *Michigan v. Taylor*, 436 U.S. 499, 510, 98 S. Ct. 1942, 1950, 56 L. Ed. 2d 486, 499 (1978). Once a fire has been extinguished, however, a warrant is required for arson investigators to search the premises to discover a possible criminal cause of the fire. *Michigan v. Clifford*, 464 U.S. 287, 294–95, 104 S. Ct. 641, 647, 78 L. Ed. 2d 477, 484–85 (1984); *Taylor*, 436 U.S. at 511, 98 S. Ct. at 1951, 56 L. Ed. 2d at 500.

Police officers may enter a private residence without a warrant when officials of another government agency have validly entered the residence and have discovered contraband. *State v. Bell*, 108 Wn.2d 193, 201, 737 P.2d 254, 259 (1987) (a marijuana-growing operation discovered in plain view by firefighters justified a warrantless entry and seizure by police). Seizure of immediately recognizable contraband by firefighters is valid if it is inadvertently discovered while they are engaged in their firefighting activities. *Id.* at 197. Exigent circumstances are not required to justify such a seizure. Police officers then step into the firefighters' shoes and may subsequently enter a residence without a warrant and seize the contraband, so long as they do not exceed the scope of the prior intrusion. *Id.* at 201; *cf. State v. Browning*, 67 Wn. App. 93, 97, 834 P.2d 84, 86 (1992) (contraband sighted during an unlawful entry by the building inspector could not be used as the basis for later police entry under warrant).

5.6. THE PLAIN VIEW DOCTRINE: DISTINCTION BETWEEN "PLAIN VIEW" AND "OPEN VIEW"

Courts have used the term "plain view" to describe the following three types of searches: (1) a search where an officer observes an item that is exposed to public view in a public place or in a location that is not constitutionally protected; (2) a search where an officer intrudes into a constitutionally protected area—either lawfully or unlawfully—and there observes a clearly exposed object; and (3) a search where an officer, standing in a nonprotected area, observes an object that is located inside a constitutionally protected area. *State v. O'Herron*, 153 N.J. Super. 570, 574, 380 A.2d 728 (1977); 1 Wayne R. LaFave, *Search and Seizure* § 2.2(a), at 447–48 (4th ed. 2004).

These three situations are distinguished by the nature of the defendant's expectation of privacy in the object. In the first situation, the discovery of an object in a public place or in a location that is not constitutionally protected is not a true search because the defendant has no reasonable expectation of privacy in an object that is exposed to the public view. *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280, 282–83 (1996). Generally, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967). *See generally supra* §§ 1.1–.3. Thus, this situation is more accurately referred to as "open view" and not "plain view." *State v. Dykstra*, 84 Wn. App. 186, 191 n.4, 926 P.2d 929, 932 n.4 (1996); *see also State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887, 891 (2004) (holding that an examination of the interior of a firearm placed in open view does not constitute a search subject to the warrant requirement).

Likewise, a search does not occur when an object, located in a protected area, is merely observed from a vantage point in a nonprotected area. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130, 135 (2000) ("An officer with legitimate business, when acting in the same manner as a reasonably respectful citizen, is permitted to enter the curtilage areas of a private residence which are impliedly open, such as access routes to the house."); *Rose*, 128 Wn.2d at 392; *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44, 46–47 (1981); 1 LaFave, *supra*, § 2.2(a), at 448–49. *But see Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 2046, 150 L. Ed. 2d 94, 106 (2001) (holding that use of a thermal imaging device, which is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion turns a surveillance into a search and is presumptively unreasonable without a warrant); *State v. Cardenas*, 146 Wn.2d 400, 409, 47 P.3d 127, 132 (2002) (noting that, "[a]lthough there is no case directly on point, courts

have overwhelmingly found that an attempt to block a view through a window shows a reasonable expectation of privacy"); *State v. Young*, 123 Wn.2d 173, 186, 867 P.2d 593, 599 (1994) (citing *State v. Myrick*, 102 Wn.2d 506, 513, 688 P.2d 151, 155 (1984), and holding that "[m]erely because it is generally known that the technology exists to enable police to view private activities from an otherwise nonintrusive vantage point, it does not follow that these activities are without protection").

In *Cardenas*, for example, police investigating an armed robbery were directed to a motel where a security guard reported seeing a vehicle matching the description of the suspects' car. 146 Wn.2d at 403–04. When the police arrived, other officers were standing next to a car that did not match the victim's original description, but contained what an officer believed were some items that matched the description of items taken. *Id.* Guests at the motel told police what room the car's occupants had hurriedly entered. *Id.* An officer had to drop to bended knees in order to peer through a three-inch gap "at the foot of closed curtains." *Id.* at 415 (Alexander, C.J., dissenting). The officer saw two males, who matched the general description of suspects, leaning over a bed and sorting through papers, including credit cards, and dart to the back of the room when the officer knocked on the door without announcing "police." *Id.* at 404. In a five to four decision, the Washington Supreme Court affirmed the conviction without deciding whether the open view doctrine applied to the officers' observations. *Id.* at 410. The court reasoned that exigent circumstances existed even without relying on the officers' observations through the window, and that their actions were justified by officer safety concerns. *Id.* However, the dissent concluded that, without the observations made through the window, exigent circumstances did not exist and the search through the window was not lawful because it was made from an unnatural vantage point. *Id.* at 414–15 (Alexander, C.J., dissenting).

Even if observations from a nonprotected vantage point do not constitute a search, privacy rights are implicated when police enter a constitutionally protected area to seize an object. *See State v. Dyreson*, 104 Wn. App. 703, 713–14, 17 P.3d 668, 673–74 (2001) (holding search invalid where detective entered vacant but open shed after renter told detective "to go look in the shed," where "looking into a building is not the same as crossing its threshold"). In other words:

> Seeing something in open view does not . . . dispose, ipso facto, of the problem of crossing constitutionally protected thresholds . . . . Light waves cross thresholds with a constitutional impunity not permitted arms and legs. Wherever the eye may go, the body of the policeman may not necessarily follow.

Charles E. Moylan, Jr., *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 Mercer L. Rev. 1047, 1096 (1975); *see also Dykstra*, 84 Wn. App. at 192–93.

Therefore, although the open view doctrine may justify observing an object located in a constitutionally protected area, it will not justify seizing the object; the search is in the entry, not in the inspection. *See Dykstra*, 84 Wn. App. at 191; *State v. Mierz*, 72 Wn. App. 783, 791, 866 P.2d 65, 71 (1994), *aff'd*, 127 Wn.2d 460, 901 P.2d 286 (1995) (view of prohibited coyote pups from legal vantage point outside of the defendant's fence did not justify an officer's warrantless entry onto property). An "open view" sighting of contraband from a constitutionally unprotected vantage point may, however, be used as a basis for securing a search warrant. *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610, 616 (2000) (open view look of stolen goods through preexisting hole between adjoining commercial storage units not a search when manager gave police permission to enter); *State v. Ferro*, 64 Wn. App. 181, 182, 824 P.2d 500, 501 (1992).

If no entry or additional search is required, seizure of an object may be permissible if an officer is virtually certain that a container holds contraband based on how "the appearance of the container itself [places] the contents . . . in effect in open view." *State v. Courcy*, 48 Wn. App. 326, 330, 739 P.2d 98, 101 (1987) (a paper "bindle" containing cocaine was observed by an officer during a lawful investigative stop). Consequently, the suspect does not have a reasonable expectation of privacy that would prevent opening the container or field testing its contents. *Id.*

5.7 Criteria for Falling Within the "Plain View" Exception

The plain view doctrine has been used to justify the seizure of objects without a warrant. The following sections discuss the criteria for falling within the exception to the warrant requirement in the second and third situations mentioned at the beginning of section 5.6: (1) the discovery and seizure of an object after entry into a constitutionally protected area and (2) the entry into a protected area and the seizure of an object that was viewed from an unprotected area.

5.7(a) Discovery of Object in Plain View Following Entry into Constitutionally Protected Area

The most common plain view situation occurs when the officer lawfully enters a constitutionally protected area and unexpectedly discovers incriminating evidence. *See, e.g., State v. Rodriguez*, 65 Wn. App. 409, 416, 828 P.2d 636, 640 (1992).

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. . . . [T]he extension of the original jurisdiction is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 2038, 29 L. Ed. 2d 564, 583 (1971).

For a warrantless seizure to fall within the plain view exception, the following two requirements must be met: (1) The police must have a prior justification for the intrusion into the constitutionally protected area and (2) the police must immediately realize that the object they observe is evidence—that is, the incriminating character of the evidence must be immediately apparent. *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761, 769 (1991). Previously, courts imposed a third requirement: The discovery of the incriminating evidence must be inadvertent. *See id.* However, neither Article I, Section 7, nor the Fourth Amendment still require inadvertent discovery to justify a seizure under the plain view exception. *See Horton v. California*, 496 U.S. 128, 130, 110 S. Ct. 2301, 2304, 110 L. Ed. 2d 112, 118–19 (1990) (concluding that inadvertent discovery is no longer a requirement under the Fourth Amendment); *see infra* § 5.7(a)(2) (discussing Washington's adoption of *Horton*).

5.7(a)(1) Prior Justification for Intrusion

The plain view doctrine applies only when the police are justified in occupying the position from which they observe the illegal object or activity. *State v. Dykstra*, 84 Wn. App 186, 191 n.4, 926 P.2d 929, 932 n.4 (1996). Thus, if an initial entry into a residence or onto property is illegal, confiscation of evidence will constitute an illegal seizure. *Id.*; *see also State v. Daugherty*, 94 Wn.2d 263, 269, 616 P.2d 649, 652 (1980), *rejected on other grounds in State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). Similarly, when the initial stop of a vehicle is unlawful—the police therefore having no right to be in a position to observe the vehicle's interior—the observation of contraband within the vehicle constitutes an unlawful search. *State v. Lesnick*, 84 Wn.2d 940, 942–43, 530 P.2d 243,

245 (1975). *See also Washington v. Chrisman*, 455 U.S. 1, 9, 102 S. Ct. 812, 818, 70 L. Ed. 2d 778, 787 (1982), *on remand to* 100 Wn.2d 814, 676 P.2d 419 (1984).

Because the plain view exception to the warrant requirement rests on the lawfulness of the officer's presence, plain view cases will have different outcomes under the federal and state constitutions when the two constitutions differ as to that lawfulness. For example, when an officer has accompanied an arrestee to the arrestee's dormitory room and follows the arrestee into the room, the inspection of objects within the room may be lawful under the Fourth Amendment, yet unlawful under Article I, Section 7. *Chrisman*, 455 U.S. at 9, 102 S. Ct. at 817–18, 70 L. Ed. 2d at 785–87 (Fourth Amendment permits officer to accompany arrestee wherever arrestee goes), *on remand to* 100 Wn.2d at 822 (Article I, Section 7 prohibits officer from entering misdemeanor arrestee's home unless officer can demonstrate threat to own safety, possibility of destruction of evidence of misdemeanor charged, or strong likelihood of escape).

5.7(a)(2) Inadvertent Discovery

Under the Fourth Amendment, the plain view exception previously did not apply when an officer expected to find the incriminating object; the officer had to discover the object inadvertently. *Coolidge*, 403 U.S. at 471, 91 S. Ct. at 2040–41, 29 L. Ed. 2d at 586. However, the United States Supreme Court has held that, "even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition." *Horton*, 496 U.S. at 130, 110 S. Ct. at 2304, 110 L. Ed. 2d at 118–19. Thus, under *Horton*, an object may be seized under the plain view exception if an officer has the subjective expectation that she will find evidence in a location where she is conducting a lawful search. *See id.* The discovery does not have to be an unexpected surprise. *Id.* at 138–40, 110 S. Ct. at 2309–10, 110 L. Ed. 2d at 124–25.

Washington courts have adopted the *Horton* approach to the plain view exception and no longer require the inadvertence prong under *Coolidge*. *See State v. Hudson*, 124 Wn.2d 107, 114 n.1, 874 P.2d 160, 164 n.1 (1994) (noting the *Horton* revision to the plain view test); *State v. Goodin*, 67 Wn. App. 623, 627–30, 838 P.2d 135, 138–39 (1992) (discussing *Horton* and suggesting that the inadvertence requirement was never explicitly required under Article I, Section 7). Recent cases set forth the test for the plain view exception as articulated in *Horton*:

> For evidence to be admissible under the "plain view" doctrine, the prosecution must prove that (1) the officer lawfully occupied the vantage point from which the evidence was discovered, (2) the offi-

> cer immediately recognized the incriminating character of the object seized, and, (3) the officer had a lawful right of access to the object itself.

State v. Tzintzun-Jimenez, 72 Wn. App. 852, 855–56, 866 P.2d 667, 669 (1994).

Thus, in Washington, the focus of the third prong of the test for admissibility under the "plain feel" exception is now on the officer's lawful access to the object seized, rather than his or her subjective state of mind at the time of the search. *See id.*; *infra* § 5.9(c) for discussion of "plain feel." *But see State v. Mierz*, 72 Wn. App. 783, 786 n.2, 866 P.2d 65, 68 n.2, 875 P.2d 1228 (1994) (listing the requirements of the plain view exception as prior justification, immediate knowledge, and inadvertent discovery).

5.7(a)(3) Immediate Knowledge: Incriminating Character Immediately Apparent

The plain view exception applies only when the police immediately recognize the incriminating nature of the object seized. *Coolidge*, 403 U.S. at 466, 91 S. Ct. at 2038, 29 L. Ed. 2d at 583. For example, the discovery of a shotgun in a bombing suspect's bedroom did not come within the plain view doctrine, despite the validity of entry under warrant, because it was not immediately apparent to the FBI officers that the shotgun was evidence of a crime. *State v. Cotten*, 75 Wn. App. 669, 683, 879 P.2d 971, 979 (1994). *See also State v. Murray*, 84 Wn.2d 527, 534, 527 P.2d 1303, 1307 (1974) (a warrantless entry into an apartment to search for stolen office equipment was justified because the owner gave consent; however, seizure of a television under the plain view doctrine not justified because evidence of the television being stolen was not readily apparent—officers tilted the television to obtain serial numbers); *State v. Gocken*, 71 Wn. App. 267, 278, 857 P.2d 1074, 1081–82 (1993) (a warrantless entry was justified under the emergency exception because evidence of foul play was immediately apparent). *See generally* 2 Wayne R. LaFave, *Search and Seizure* § 4.11(d) (4th ed. 2004).

If an object has to be moved or tampered with in any way to determine whether it is evidence of a crime, the "immediately apparent" prong of the plain view test will fail. *See, e.g., Arizona v. Hick*s, 480 U.S. 321, 328, 107 S. Ct. 1149, 1154, 94 L. Ed. 2d 347, 356 (1987) (the scope of plain view was exceeded when police lifted stereo components to read serial numbers). Police must connect items to a crime based solely on what is exposed to their view; there is a distinction between "'looking' at a suspicious object in plain view and 'moving' it even a few inches." *Id.* at 325, 107 S. Ct. at 1152, 94 L. Ed. 2d at 354. *See generally* 2 LaFave,

supra, §§ 4.11(b), at 687–91, 4.11(c), at 691–98 (suggesting that officers must be aware of facts that justify a reasonable suspicion that the items are incriminating in order to inspect items and that officers must have probable cause in order to seize the items).

The officer's knowledge that the object is evidence of a crime need not be certain to lawfully seize; it is sufficient that the officer has probable cause to believe that the object or substance constitutes incriminating evidence. *See Texas v. Brown*, 460 U.S. 730, 741, 103 S. Ct. 1535, 1543, 75 L. Ed. 2d. 502, 513 (1983) (interpreting the term "immediately apparent" to mean "requiring probable cause in the ordinary case"); *State v. Sistrunk*, 57 Wn. App. 210, 214, 787 P.2d 937, 939 (1990). Thus, in *State v. Gonzales*, a clear vial of capsules and pills, "viewed in context" of other items of drug paraphernalia, was properly seized, even though consent was given only for jewelry and other items. 46 Wn. App. 388, 400–01, 731 P.2d 1101, 1108–09 (1986). On the other hand, a closed brown paper bag containing marijuana was improperly seized since its weight immediately indicated that it could not contain items within the scope of consent, and the marijuana was clearly not within plain view. *Id.* at 400; *see also Sistrunk*, 57 Wn. App. at 214 (no probable cause to seize empty beer cans in open view when the condition of cans was consistent with driver's explanation that they had been picked up for recycling); *State v. Anderson*, 41 Wn. App. 85, 96, 702 P.2d 481, 490 (1985), *rev'd on other grounds*, 107 Wn.2d 745, 733 P.2d 517 (1987) (although warrant was limited to a search for clothing, police properly seized weapons and weapon components discovered within the allowable area of the search that were probable instrumentalities of the crime under investigation).

A useful synthesis of Washington cases and doctrine pertaining to the issue of when an object's incriminating nature is immediately apparent is found in *State v. Legas*, 20 Wn. App. 535, 542, 581 P.2d 172, 176 (1978) (officers may inspect for serial numbers on radio equipment when they have a well-founded suspicion that the equipment is stolen, based upon knowledge of other stolen property on the premises, past criminal activities of the person having access to the premises, and a peculiarly large quantity of equipment). *See also State v. McCrea*, 22 Wn. App. 526, 528, 590 P.2d 367, 368 (1979) (when federal officers executing a warrant for a machine gun came upon items they thought might be controlled substances and called local officers to identify items, seizure was unlawful because the incriminating nature was not immediately apparent to the federal officers, and local officers had no prior justification for intrusion); *State v. Keefe*, 13 Wn. App. 829, 832–35, 537 P.2d 795, 797–

99 (1975) (a typewriter sample could not be seized under the plain view doctrine while police executed a search warrant for a stolen gun).

Under the plain view doctrine, officers may seize objects that have a "sufficient nexus" with the crime under investigation or that will aid in apprehension or conviction of a suspect. *State v. Stenson*, 132 Wn.2d 668, 695, 940 P.2d 1239, 1254 (1997); *State v. Terrovona*, 105 Wn.2d. 632, 648, 716 P.2d 295, 303 (1986); *State v. Turner*, 18 Wn. App. 727, 729, 571 P.2d 955, 957 (1977).

An officer's knowledge and experience is relevant to determining whether an object is legally seized under the plain view exception. *Andresen v. Maryland*, 427 U.S. 463, 483, 96 S. Ct. 2737, 2749, 49 L. Ed. 2d 627, 644 (1976) (use of specially trained investigators supported the seizure of business records with nexus to crime under investigation). Thus, an officer's experience and knowledge that plastic baggies are common receptacles for marijuana will enable the officer to immediately recognize the incriminating nature of a baggie, even when its contents are not observed. *State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445, 452 (1986).

5.7(b) Seizure of Object from Protected Area After Observing Object from Nonprotected Area

The "open view" doctrine applies where the police officer is in a public or nonprotected area at the time of observation of contraband within a constitutionally protected area. The officer's mere visual observation, without physical intrusion, does not constitute a "search" because there is no reasonable expectation of privacy in objects observed where the open view doctrine is satisfied. *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280, 283 (1996); *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44, 47 (1981). *See also State v. Campbell*, 103 Wn.2d 1, 23, 691 P.2d 929, 942 (1984) (when an officer peered into the defendant's car on a public street and saw blood on the door handle and jewelry similar to that observed at a homicide scene, his observation fell within the open view doctrine); 1 LaFave, *supra*, § 2.2(a), at 448–49.

An officer who enters a constitutionally protected area to seize an object observed from outside the area under the open view doctrine cannot then justify his warrantless seizure under the plain view doctrine. *Mierz*, 72 Wn. App. at 791 n.6; *State v. Ferro*, 64 Wn. App. 181, 182, 824 P.2d 500, 501 (1992) (lawful aerial observation of marijuana plants did not justify a warrantless intrusion onto the property and seizure of the plants).

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle . . .

> that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.

Coolidge, 403 U.S. at 468, 91 S. Ct. at 2039, 29 L. Ed. 2d at 584 (emphasis added). *See also Taylor v. United States*, 286 U.S. 1, 5–6, 52 S. Ct. 466, 467, 76 L. Ed. 951, 953 (1932) (although police were standing where they had a right to be when they looked through a small opening in a garage and saw contraband, their warrantless entry to seize the contraband was unconstitutional).

Thus, a police officer who lawfully observes contraband within a constitutionally protected area may enter the area without a warrant only if the officer can justify the entry by one of the other exceptions to the warrant requirement. *See State v. Drumhiller*, 36 Wn. App. 592, 596–97, 675 P.2d 631, 633 (1984) (defendant was observed through a window snorting cocaine; exigent circumstances justified warrantless entry); 1 LaFave, *supra*, § 2.2(a), at 450–52. *See also State v. O'Herron*, 153 N.J. Super. 570, 582–83, 380 A.2d 728, 734 (1977) (warrantless entry into defendant's vegetable garden to seize lawfully observed marijuana plants was unconstitutional where no warrant exception was shown).

5.7(c) Curtilage as a Protected Area

The curtilage of a residence is defined as that area "so intimately tied to the home itself that it should be placed under the 'umbrella' of Fourth Amendment protection." *United States v. Dunn*, 480 U.S. 294, 300–01, 107 S. Ct. 1134, 1139–40, 94 L. Ed. 2d 326, 334–35 (1987). As such, heightened Fourth Amendment protection extends to a home's curtilage. *State v. Ridgway*, 57 Wn. App. 915, 918, 790 P.2d 1263, 1265 (1990). Visual and other open view observations made by police from the curtilage have been upheld in Washington under both the Fourth Amendment and Article I, Section 7. *See State v. Smith*, 118 Wn. App. 480, 484–85, 93 P.3d 877, 879 (2003) (a person does not have a reasonable expectation of privacy in areas of a home's curtilage impliedly open to the public). Police conducting legitimate business may enter areas of a home's curtilage that are impliedly open. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130, 135 (2000). In connection with an investigation, officers may approach a residence from any common access route "apparently open to the public, such as the driveway [or] the walkway." *State v. Dodson*, 110 Wn. App. 112, 123, 39 P.3d 324, 331 (2002). In essence,

officers may intrude to the same extent as any reasonably respectful citizen and they may do so with their "eyes open." *State v. Petty*, 48 Wn. App. 615, 620, 740 P.2d 879, 882 (1987); *Seagull*, 95 Wn.2d at 902. *See also Rose*, 128 Wn.2d at 394 (no reasonable expectation of privacy in what is viewed through uncurtained windows). For an in-depth discussion of cases upholding intentional viewing by police officers at residences through unobstructed windows, see *Rose*, 128 Wn.2d at 394–97.

The facts of each case determine whether a portion of the curtilage is impliedly open to the public. *State v. Hornback*, 73 Wn. App. 738, 743, 871 P.2d 1075, 1078 (1994). Factors to be considered in determining whether an officer exceeded the scope of "open view" include whether the officer: (1) spied into the house; (2) acted secretly; (3) approached the house in daylight; (4) used the normal, most direct access route to the house; (5) attempted to talk to the resident; (6) created an artificial vantage point; and (7) made the discovery accidentally. *Myers*, 117 Wn.2d at 345. A court will not apply these factors as a fixed formula. *Ross*, 141 Wn.2d at 309 n.1. The posting of "no trespassing" signs is not dispositive on the issue of privacy, but is an additional factor that may be considered. *State v. Gave*, 77 Wn. App. 333, 338, 890 P.2d 1088, 1091 (1995); *Hornback*, 73 Wn. App. at 744; *State v. Johnson*, 75 Wn. App. 692, 702, 879 P.2d 984, 990 (1994).

The open view doctrine applies when officers approach a suspect's residence during daylight, by a direct access, and with no spying or secretive actions, but not when police activity exceeds reasonable bounds. *See Myers*, 117 Wn.2d at 345 (officer approached the home during daylight via the most direct access route); *Dykstra*, 84 Wn. App. at 193 (open view inapplicable where police officers climbed onto the back porch at 3:00 a.m., despite the homeowner's protests, yanked the door out of the homeowner's hands, and entered the dwelling). *See also Hornback*, 73 Wn. App. at 743 (scope of open view exceeded where officers substantially and unreasonably departed from the area of curtilage impliedly open to the public by entering into a side yard); *State v. Graffius*, 74 Wn. App. 23, 28, 871 P.2d 1115, 1118 (1994) (marijuana bud observed in a partially opened garbage can in the curtilage area did not exceed the scope of open view); *State v. Hepton*, 113 Wn. App. 673, 676–77, 54 P.3d 233, 236 (2002) (no reasonable expectation of privacy in garbage bags left in front of neighboring abandoned house). *Cf. State v. Sweeney*, ___ P.3d ___, No. 22439–2–III, 2005 WL 353246, at *4 (Wn. App. Div. 3 Feb. 15, 2005) (illegal search where suspect's curbside garbage was collected separately by garbage collector, taken a block away, and then made available for inspection by a police detective).

5.7(d) Open Field as a Protected Area

Open fields are not entitled to protection from unreasonable search and seizure under the Fourth Amendment. *Oliver v. United States*, 466 U.S. 170, 179, 104 S. Ct. 1735, 1741, 80 L. Ed. 2d 214, 224 (1984). In contrast, Washington courts have accepted the notion that an open field can be subject to an unreasonable search and seizure. *See Johnson*, 75 Wn. App. at 707. Under Article I, Section 7, a case-by-case analysis determines whether a particular search and seizure unconstitutionally intrudes into a person's private affairs. *Id.*; *see State v. Hansen*, 42 Wn. App. 755, 761, 714 P.2d 309, 314 (1986) (warrantless search of a garden upheld under Article I, Section 7 and open fields doctrine where the field was not posted and contents were clearly visible to any passerby); *State v. Myrick*, 102 Wn.2d 506, 513–14, 688 P.2d 151, 155 (1984) (aerial surveillance of marijuana from 1,500 feet without visual enhancement devices did not violate Article I, Section 7). *See also Johnson*, 75 Wn. App. at 707–08 (conduct of DEA agents violated Article I, Section 7 when they acted in concert with state officials and trespassed on property, ignoring property owner's fence, gate, and no trespassing signs); *State v. Crandall*, 39 Wn. App. 849, 854, 697 P.2d 250, 253 (1985) (isolated trespass by a deputy into an open, unposted field frequented by hunters did not violate Article I, Section 7). *But see Dodson*, 110 Wn. App. at 123 (explaining that the presence of "no trespassing" signs is not dispositive of homeowner's reasonable expectation of privacy); *State v. Thorson*, 98 Wn. App. 528, 536, 990 P.2d 446, 450 (1999) (officers' search of rural wooded property on island invalid because, "[u]nlike the field in *Crandall*, Thorson's property was not frequented or traversed by uninvited persons. Although part of the island's trail system crossed Thorson's land, the unrebutted evidence is that the footpaths were used, by permission, only by other residents of the island, and are not for use as public ways").

5.8. PLAIN VIEW: AIDING THE SENSES WITH ENHANCEMENT DEVICES

"It is clear that the police with legitimate business may enter areas of curtilage which are impliedly open. In so doing, the police are free to use their senses." *State v. Thompson*, 151 Wn.2d 793, 807, 92 P.3d 228, 235 (2004) (quoting *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44, 47 (1981)). Under both the Fourth Amendment and Article I, Section 7, the police may use flashlights to aid their observations, provided that (1) the observation is from a location where the officer has a right to be and (2) the observation could have taken place without flashlights in daylight. *State v. Rose*, 128 Wn.2d 388, 400–01, 909 P.2d 280, 287 (1996)

(no unlawful search when police used a flashlight from the lawful vantage point of the front porch; marijuana was observed in plain view through an unobstructed window). The use of flashlights is permitted on the theory that what is observed with the aid of a flashlight is "no more invasive than observations with natural eyesight during daylight would have been." *Id. See also State v. Young*, 28 Wn. App. 412, 417, 624 P.2d 725, 729 (1981) (tools suspected of being used in a robbery were properly seized when an officer observed the tools after shining a flashlight on the front seat of a car with the door left open). *See generally United States v. Booker*, 461 F.2d 990, 992 (6th Cir. 1972); *Marshall v. United States*, 422 F.2d 185, 188 (5th Cir. 1970); 1 Wayne R. LaFave, *Search and Seizure* § 2.2(b) (4th ed. 2004).

The rule governing magnification is similar to the one governing the use of flashlights. Under both the Fourth Amendment and Article I, Section 7, the police may use binoculars and telescopes to observe objects in the open and subject them to some scrutiny by the naked eye from the same location, or to observe objects that they lawfully could have observed from a closer location. *State v. Jones*, 33 Wn. App. 275, 277, 653 P.2d 1369, 1370–71 (1982); *see also State v. Manly*, 85 Wn.2d 120, 125, 530 P.2d 306, 309 (1975); *State v. Ludvik*, 40 Wn. App. 257, 264, 698 P.2d 1064, 1069 (1985). *See generally* 1 LaFave, *supra*, § 2.2(c). The magnification rule is based on the theory that the sense-enhancing capability of binoculars and telescopes merely provides information that could have been otherwise obtained. *State v. Young*, 123 Wn.2d 173, 183 n.1, 867 P.2d 593, 598 n.1 (1994). Consequently, the rule does not permit enhanced observations that enable an officer to observe objects or activities that could not have been observed by the naked eye; in these circumstances, the defendant may have a legitimate expectation of privacy in the objects or activities. *See, e.g., United States v. Kim*, 415 F. Supp. 1252, 1254–56 (D. Haw. 1976) (plain view exception does not apply to FBI agents' use of 800-millimeter telescope to observe activities in the defendant's apartment one-quarter mile away when no observation was possible from a closer location); *State v. Kender*, 60 Haw. 301, 306–07, 588 P.2d 447, 450–51 (1978) (plain view exception did not apply where an officer climbed a neighbor's fence to view the defendant's backyard, which otherwise would have been concealed by a fence and heavy foliage). *But see Commonwealth v. Hernley*, 216 Pa. Super. 177, 180, 263 A.2d 904 (1970) (applying the plain view exception to a binocular observation from atop a four-foot ladder of activity that could not have been seen with the naked eye).

A particularly intrusive method of viewing that reveals evidence not exposed to the general public may be considered a search. *See Kyllo*

v. United States, 533 U.S. 27, 40, 121 S. Ct. 2038, 2046, 150 L. Ed. 2d 94, 106 (2001) (holding that the use of a thermal imaging device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion turns surveillance into a search and is presumptively unreasonable without a warrant); *Young*, 123 Wn.2d at 182–84. For example, the Washington Supreme Court has held that the warrantless infrared surveillance of a home violates both Article I, Section 7 and the Fourth Amendment because the heat distribution patterns detected were undetectable by the naked eye or other senses. *Id.* at 183; *cf. United States v. Penny-Feeny*, 773 F. Supp. 220, 225–28 (D. Haw. 1991) (upholding infrared surveillance of navigable airspace above defendant's residence).

Aerial surveillance is generally not considered to be an enhancement that gives rise to a search violating the Fourth Amendment or Article I, Section 7, so long as the search occurs from public, navigable airspace and is conducted in a physically unintrusive fashion. *California v. Ciraolo*, 476 U.S. 207, 213–15, 106 S. Ct. 1809, 1813–14, 90 L. Ed. 2d. 210, 217–18 (1986); *State v. Myrick*, 102 Wn.2d 506, 513–14, 688 P.2d 151, 155 (1984) (holding aerial surveillance of open fields at 1,500 feet without the use of visual enhancement not unreasonably intrusive); *State v. Wilson*, 97 Wn. App. 578, 581, 988 P.2d 463, 465 (1999) ("Aerial surveillance is not a search where the contraband is identifiable with the unaided eye, from a lawful vantage point, and from a nonintrusive altitude."). *But see Florida v. Riley*, 488 U.S. 445, 451–52, 109 S. Ct. 693, 697, 102 L. Ed. 2d 835, 842–43 (1989) (suggesting an aerial surveillance might violate the Fourth Amendment if it revealed "intimate details" or caused "excessive noise or other disturbances"); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239, 106 S. Ct. 1819, 1827, 90 L. Ed. 2d 226, 238 (1986) (upholding high-altitude aerial photographic surveillance by the EPA).

5.9 Extensions of the Plain View Doctrine

5.9(a) Plain Hearing

Courts in other jurisdictions have recognized a "plain hearing" analog to the plain view doctrine. Defendants have been held to have no reasonable expectation of privacy regarding motel room conversations that are overheard with unaided ears in the motel room next door. *See United States v. Jackson*, 588 F.2d 1046, 1051–52 (5th Cir. 1979); *see also United States v. Baranek*, 903 F.2d 1068, 1071 (6th Cir. 1990) (inadvertently intercepted nontelephonic conversations were authorized under "plain view" exception to the warrant requirement); *State v. Texeira*, 62

Haw. 44, 49, 609 P.2d 131 (1980) (aural observations of gambling activities admissible when overheard by officer who trespassed on adjacent property to gain vantage point); *State v. Gil*, 208 Wis. 2d 531, 545–46, 561 N.W.2d 760 (Wis. Ct. App. 1997) (surveillance evidence of attempted robbery and attempted homicide admissible under "plain hearing" exception). Use of hearing enhancement devices may "raise very different and far more serious questions" from visual enhancement devices when determining the reasonable expectation of the privacy of defendants and, consequently, when determining whether a warrant is required. *Dow Chem. Co. v. United States*, 476 U.S. 227, 238–39, 106 S. Ct. 1819, 1827, 90 L. Ed. 2d 226, 238 (1986).

In Washington, eavesdropping by means of an electronic device or the interception of private telephone, telegraph, radio, or other electronic communications is governed by Washington's Violating Right of Privacy Act, RCW 9.73. Tape recordings made by federal agents pursuant to the federal wiretap statute are inadmissible in state court when the recordings are made in violation of the Washington statute. *State v. Williams*, 94 Wn.2d 531, 541, 617 P.2d 1012, 1018 (1980). Police testimony about such recorded conversation is also inadmissible. *Cf. infra* § 7.3(c) (discussing the use of illegally obtained evidence at probable cause hearings); *see also* Tara McGraw Swaminatha, *The Fourth Amendment Unplugged: Electronic Evidence Issues & Wireless Defenses: Wireless Crooks & the Wireless Internet Users Who Enable Them*, 7 Yale Symp. L. & Tech. 51 (2004/2005).

5.9(b) Plain Smell

Courts have generally accepted the "plain smell" exception as a branch of the plain view doctrine. Thus, odor has been used to justify warrantless entries and seizures so long as the officer was lawfully in the location where the odor was detected. *See, e.g., Illinois v. Caballes*, ___ U.S. ___, ___, 125 S. Ct. 834, 845, ___ L. Ed. 2d ___, ___ (2005) (warrantless search of car trunk valid when dog sniff of exterior of car detected drugs inside trunk and when police lawfully pulled car over for traffic stop); *United States v. Morin*, 949 F.2d 297, 300 (10th Cir. 1991) (odor of marijuana can justify a search of an automobile or luggage); *United States v. Lueck*, 678 F.2d 895, 903 (11th Cir. 1982) (contents of packages could be inferred where the packages "reeked of marijuana"); *United States v. Pagan*, 395 F. Supp. 1052, 1061 (D.P.R. 1975) (explaining that the plain view doctrine has been expanded to cover evidence perceived by sense of smell); *Mazen v. Seidel*, 189 Ariz. 195, 200–01, 940 P.2d 923 (1997) (smell of burning marijuana is an exigent circumstance justifying warrantless entry); *People v. Mendez*, 948 P.2d 105, 108

(Colo. Ct. App. 1997) (legislature never intended to bar a finding of probable cause based on smell of burning marijuana); *People v. Kazmierczak*, 461 Mich. 411, 413, 605 N.W.2d 667 (2000) (smell of marijuana alone by a person qualified to know the odor may establish probable cause to search a motor vehicle). *But see United States v. Fernandez*, 943 F. Supp. 295, 299 (S.D.N.Y. 1996) (odor of marijuana noticed on defendant during *Terry* stop and frisk did not justify search inside clothing). *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 2.2(a), at 454–55 (4th ed. 2004).

Washington has permitted the warrantless seizure of an object based on its odor when the odor established probable cause or when the odor was in "open view." *See State v. Myers*, 117 Wn.2d 332, 345, 815 P.2d 761, 769 (1991) (odor of marijuana was in "open view"); *State v. Huckaby*, 15 Wn. App. 280, 290–91, 549 P.2d 35, 42 (1976); *see also State v. Hammone*, 24 Wn. App. 596, 599, 603 P.2d 377, 379 (1979) (marijuana odor emanating from vehicle); *State v. Compton*, 13 Wn. App. 863, 864–65, 538 P.2d 861, 861–62 (1975) (smell of marijuana and discovery of greenish-brown vegetable substance was a legal warrantless search). Odor can also support a warrantless entry and can serve as probable cause for a search warrant. *See State v. Gave*, 77 Wn. App. 333, 336, 890 P.2d 1088, 1090 (1995) (odor of marijuana supported warrant probable cause requirement); *State v. Gocken*, 71 Wn. App. 267, 278, 857 P.2d 1074, 1081 (1993) (odor of decaying flesh justified warrantless entry at homicide scene).

5.9(c) Plain Feel

The "plain feel" or "plain touch" doctrine has been recognized as a corollary of the plain view doctrine. Under the plain touch exception to the warrant requirement, police may seize nonthreatening contraband detected through the officer's sense of touch during a legitimate patdown search so long as the search does not exceed the scope delineated by *Terry*. *Minnesota v. Dickerson*, 508 U.S. 366, 375–76, 113 S. Ct. 2130, 2136–37, 124 L. Ed. 2d 334, 345–46 (1993); *cf. Bond v. United States*, 529 U.S. 334, 337–39, 120 S. Ct. 1462, 1464–65, 146 L. Ed. 2d 365, 338 (2000) (border patrol agent's exploratory manipulation of bus passenger's opaque bag violated the Fourth Amendment). The object will be admissible only if its "contour or mass makes its identity immediately apparent." *Dickerson*, 508 U.S. at 365–76, 113 S. Ct. at 2136–37, 124 L.Ed. 2d at 345–46. However, any "squeezing, sliding or otherwise manipulating" the object extends the search beyond the scope of *Terry*, thus rendering the search constitutionally invalid. *Id.* at 378, 113 S. Ct. at 2138, 124 L. Ed. 2d at 347.

For examples of cases in other jurisdictions applying the *Dickerson* plain touch rule, see *United States v. Rivers*, 121 F.3d 1043, 1047 (7th Cir. 1997) (seizure of crack cocaine from pocket of defendant permissible under "plain feel" doctrine); *State v. Ashley*, 37 F.3d 678, 681 (D.C. Cir. 1994) (crack cocaine was admissible when found in the defendant's underwear during consensual search); *United States v. Schiavo*, 29 F.3d 6, 9 (1st Cir. 1994) (search was impermissible where the officer concluded that no weapon was present and yet continued to explore the bag in the defendant's jacket); *State v. Denis*, 691 So. 2d 1295, 1300 (La. Ct. App. 1997) (finding no justification under "plain feel" for the seizure of a bag of cocaine when the officer testified that he did not believe the bulge in the defendant's waistband was a weapon).

5.10 CONSENT SEARCHES: INTRODUCTION

A warrantless search is constitutional when valid consent is granted. *Washington v. Chrisman*, 455 U.S. 1, 9–10, 102 S. Ct. 812, 818, 70 L. Ed. 2d 778, 787 (1982); *State v. Cantrell*, 124 Wn.2d 183, 187, 875 P.2d 1208, 1210 (1994). A valid consent search requires that (1) the consent be "voluntary," (2) the consent be granted by a party having the authority to consent, and (3) the search be limited to the scope of the consent granted. *State v. Hastings*, 119 Wn.2d 229, 234, 830 P.2d 658, 661 (1992). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.1 (4th ed. 2004). Furthermore, while the Fourth Amendment does not require targets of searches to be told they have the right to refuse the search, *United States v. Drayton*, 536 U.S. 194, 207, 122 S. Ct. 2105, 2114, 153 L. Ed. 2d 242, 255 (2002), Article I, Section 7 of the Washington Constitution provides heightened protection against unreasonable searches. Thus, "where the State seeks to justify a search on the basis of consent, it has the burden of showing that the consent was voluntary, an *essential* element of which is knowledge of the right to refuse consent." *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927, 933 (1998) (quoting *State v. Johnson*, 68 N.J. 349, 353–54, 346 A.2d 66 (1975) (alteration in original)).

5.11. VOLUNTARINESS OF CONSENT: BURDEN OF PROOF

The State has the burden of proving that consent to a search was given voluntarily. *State v. Ferrier*, 136 Wn.2d 103, 116, 960 P.2d 927, 933 (1998) (citing *State v. Smith*, 115 Wn.2d 775, 789, 801 P.2d 975, 983 (1990)). The level of proof required is "clear and convincing evidence." *Smith*, 115 Wn.2d at 789. For a discussion of the distinctions between voluntary consent and waiver of constitutional rights, see gener-

ally 4 Wayne R. LaFave, *Search and Seizure* § 8.1(a), at 598–606 (4th ed. 2004).

5.12 FACTORS CONSIDERED IN DETERMINING VOLUNTARINESS

The validity or voluntariness of a consent to search is analyzed in a similar manner as the voluntariness of a confession. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49, 93 S. Ct. 2041, 2058–59, 36 L. Ed. 2d 854, 875 (1973). *But cf. State v. Wethered*, 110 Wn.2d 466, 471, 755 P.2d 797, 800 (1988) (consent to search is distinguished from testimonial admissions since the former is consistent with innocence). In Washington, the issue "is clearly an interest of local concern . . . due to '[t]he heightened protection afforded *state* citizens against unlawful intrusion into private dwellings [that] places an onerous burden upon the government to show a compelling need to act outside our warrant requirement.'" *State v. Ferrier*, 136 Wn.2d 103,114, 960 P.2d 927, 932 (1998) (quoting *State v. Chrisman*, 100 Wn.2d 814, 822, 676 P.2d 419, 424 (1984) (alteration in original)).

The Washington Supreme Court adopted the following rule to be applied when consent to search a home under Article I, Section 7 is at issue:

> [W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person[s] from whom consent is sought that [they] may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Ferrier, 136 Wn.2d at 118–19; *see also* RCW 10.31.040 (codification of knock and announce rule in arrest situation); *supra* § 3.7.

The Washington Supreme Court has declined to extend the *Ferrier* knock and talk rule when police seek entry into a home only to question a resident in the course of investigating a crime. *State v. Khounvichai*, 149 Wn.2d 557, 559, 69 P.3d 862, 863 (2003). In other words, police do not have to give residents warning that they may refuse to consent to a search or limit the search when the purpose of the visit is to question residents and not to search for contraband or evidence of a crime. *Id.*; *see also State v. Tagas*, 121 Wn. App. 872, 878, 90 P.3d 1088, 1091–92 (2004) (concluding that under Article I, Section 7, the validity of defendant's consent to the search of her purse did not depend on the officer

advising her of her right to refuse consent to search). See supra § 3.7 for discussion of knock and announce rule.

5.12(a) Police Claim of Authority to Search

An express or implied claim by the police that they will proceed immediately to conduct the search even without the individual's consent is likely to indicate that the subsequent consent was involuntary. *See Bumper v. North Carolina*, 391 U.S. 543, 550, 88 S. Ct. 1788, 1792, 20 L. Ed. 2d 797, 803 (1968); *State v. Browning*, 67 Wn. App. 93, 97–98, 834 P.2d 84, 86–87 (1992) (acquiescence to a claim of authority is not equivalent to free and voluntary consent to a search). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.2(a) (4th ed. 2004).

A threat to seek a warrant if the person refuses to allow a search does not, however, automatically invalidate consent. *See State v. Smith*, 115 Wn.2d 775, 790, 801 P.2d 975, 983 (1990) (no coercion where the defendant was told officers would seek a search warrant if consent was not given to search the trunk of car); *State v. Murray*, 84 Wn.2d 527, 534, 527 P.2d 1303, 1307 (1974) (initial intrusion justified where defendant gave consent to enter apartment); *State v. Bellows*, 72 Wn.2d 264, 267–68, 432 P.2d 654, 656–57 (1967) (officer's search of motel room justified when defendant gave consent); *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 183, 931 P.2d 208, 215 (1997) (threats to obtain a search warrant may invalidate consent when grounds for obtaining a warrant do not exist; coercion is a question of fact determined from the totality of circumstances). *See generally* 4 LaFave, *supra*, § 8.2(c). Police misrepresentation regarding the existence of a search warrant may invalidate consent to a search or seizure under the Fourth Amendment. *See Bumper*, 391 U.S. at 548, 88 S. Ct. at 1790, 20 L. Ed. 2d at 802; *State v. McCrorey*, 70 Wn. App. 103, 112 n.8, 851 P.2d 1234, 1239 n.8 (1993).

5.12(b) Coercive Surroundings

If the police make a show of force at the time consent is sought, or if the surroundings are coercive in other respects, the consent will generally not be considered voluntary. *See McNear v. Rhay*, 65 Wn.2d 530, 537, 398 P.2d 732, 737 (1965); *State v. Dresker*, 39 Wn. App. 136, 139, 692 P.2d 846, 848–49 (1984); *State v. Werth*, 18 Wn. App. 530, 535–36, 571 P.2d 941, 943–44 (1977) (when the defendant was placed under physical restraint and not informed of the right to refuse consent to search, and when the police had searched her home illegally without consent two days previously, the defendant did not voluntarily consent to the search of her home even if she verbalized consent); *supra* § 1.4(a); *cf.*

United States v. Drayton, 536 U.S. 194, 203–04, 122 S. Ct. 2105, 2112, 153 L. Ed. 2d 242, 253 (2002) (surroundings not coercive when police officers boarded a bus and obtained permission to search where "[t]here was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice"); *INS v. Delgado*, 466 U.S. 210, 219, 104 S. Ct. 1758, 1764, 80 L. Ed. 2d 247, 258 (1984) (INS agents in search of illegal aliens, moving systematically through a factory asking workers about their citizenship while other INS agents were stationed at the factory exits, did not create a coercive situation that constituted an illegal seizure to invalidate search). *See generally* 4 LaFave, *supra*, § 8.2(b). Coercive effects can, however, "be mitigated by requiring officers who conduct [knock and talk searches] to warn home dwellers of their right to refuse consent to a warrantless search." *Ferrier*, 136 Wn.2d at 116.

The fact that a defendant is in custody when he consents to a search does not by itself establish coercion or involuntary consent. *United States v. Watson*, 423 U.S. 411, 424, 96 S. Ct. 820, 828, 46 L. Ed. 2d 598, 609 (1976); *McNear*, 65 Wn.2d at 538. Consent was held to be voluntary and uncoerced where the defendant, arrested on the porch of his home in midwinter wearing only pants and a T-shirt, consented to officers accompanying him into his home; the arresting officers had given the defendant the alternative of proceeding to the police station as he was, but indicated that if he returned inside, they would have to accompany him. *State v. Nelson*, 47 Wn. App. 157, 163–64, 734 P.2d 516, 520 (1987). Defendant's fear that his behavior might appear "crazy" if he accepted arrest without his jacket and keys was not considered equal to coercion. *Id.* at 163. Custodial restraint is, however, a significant factor in assessing voluntariness. *See State v. Avila-Avina*, 99 Wn. App. 9, 14–15, 991 P.2d 720, 724 (2000) (no valid consent given by someone who was illegally seized by being detained in patrol car four hours after the initial purpose for detainment had been fulfilled); *Werth*, 18 Wn. App. at 535–36; *State v. Rodriguez*, 20 Wn. App. 876, 881, 582 P.2d 904, 907 (1978).

5.12(c) Awareness of the Constitutional Right to Withhold Consent

Although an individual's knowledge of the right to refuse a search is taken into account in determining whether consent to a search is voluntary, the State may prove that consent was voluntary without establishing such knowledge. *Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2048, 36 L. Ed. 2d at 863; *McCrorey*, 70 Wn. App. at 112; *see also State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123, 125 (1975); *Werth*, 18 Wn. App. at 535–36; *cf. Rodriguez*, 20 Wn. App. at 880–81 (consent was vol-

untary despite the defendant's assertion that he was not told and did not know of the right to refuse consent). *See generally* 4 LaFave, *supra*, § 8.2(i). Where police seek to justify a warrantless search of a private home, however, knowledge of the right to refuse consent is an essential element. *Ferrier,* 136 Wn.2d at 116. "[T]he only sure way to give such a protection substance is to require a warning of its existence." *Id.*

> [Police officers] must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Id. at 118–19. *But see State v. Bustamante-Davila*, 138 Wn.2d 964, 984, 983 P.2d 590, 600 (1999) (*Ferrier* rule not applicable because police did not go to suspect's house to search for contraband without a search warrant; they simply provided backup to a requesting INS agent when suspect permitted agent and officers into home where officers saw rifle in plain view).

Washington and the majority of other jurisdictions hold that the failure to give *Miranda* warnings to a defendant in custody does not automatically invalidate a consent to search. *Nelson*, 47 Wn. App. at 162; *see also McCrorey*, 70 Wn. App. at 111 (whether *Miranda* warnings were given is one factor to consider in the totality of the circumstances).

5.12(d) Prior Illegal Police Action

A prior illegal act by the police may suggest that the defendant's consent was involuntary. *See, e.g., Werth*, 18 Wn. App. at 535 ("In view of the additional circumstance that two days before, Werth's home had been searched illegally without her consent, it is apparent that overall, the situation was rife with coercion."). *See generally* 4 LaFave, *supra*, § 8.2(d). Thus, a prior illegal search or arrest may taint the subsequent consent and thereby render the consent invalid. *See generally McCrorey*, 70 Wn. App. at 111–12 (prior illegal police activity is one factor when considering the totality of the circumstances); 4 LaFave, *supra*, § 8.2(d).

The State has the burden of proving that a consent search was not obtained by the exploitation of a prior illegal search. *Bustamante-Davila*, 138 Wn.2d at 981–98.

> Whether consent is freely given is a question of fact dependent upon the totality of the circumstances which includes '(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and

> (3) whether the consenting person had been advised of his right to consent.' No one factor is dispositive.

Id. (citations omitted); *see State v. Jensen*, 44 Wn. App. 485, 488, 723 P.2d 443, 445 (1986) (although only two hours intervened between the search and the consent, the consent was valid because, in the intervening period, the defendant was advised of his right to refuse consent, had verbally consented twice, was allowed to call his sister, and there was no evidence that police did anything to frighten or intimidate defendant); *see also Taylor v. Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 2667, 73 L. Ed. 2d 314, 319 (1982); *State v. Tijerina*, 61 Wn. App. 626, 629, 811 P.2d 241, 243 (1991).

5.12(e) Maturity, Sophistication, and Mental or Emotional State

The sophistication and emotional state of the defendant are always considered in assessing the voluntariness of the consent. *Schneckloth*, 412 U.S. at 248, 93 S. Ct. at 2058, 36 L. Ed. 2d at 875 ("The traditional definition of voluntariness we accept today has always taken into account evidence of minimal schooling [and] low intelligence . . . ."); *Shoemaker*, 85 Wn.2d at 212 (determination of voluntariness should include consideration of "the degree of education and intelligence of the consenting person"); *see also United States v. Mendenhall*, 446 U.S. 544, 558, 100 S. Ct. 1870, 1879, 64 L. Ed. 2d 497, 512 (1980). *See generally* 4 LaFave, *supra*, § 8.2(e). While the mental condition of a defendant is a significant factor in determining voluntariness, the presence of mental illness itself is insufficient to render a consent to search invalid. *See State v. Sondergaard*, 86 Wn. App. 656, 662, 938 P.2d 351, 354 (1997); *cf. Colorado v. Connelly*, 479 U.S. 157, 164, 107 S. Ct. 515, 520, 93 L. Ed. 2d 473, 482 (1986) (voices directing the psychotic defendant to confess to murder were not the result of police coercion).

5.12(f) Prior Cooperation or Refusal to Cooperate

A prior voluntary confession or other type of cooperation with the police will weigh in favor of a finding that the consent to search was voluntary. *See State v. Raines*, 55 Wn. App. 459, 462, 778 P.2d 538, 541 (1998). A prior refusal to consent to a search will suggest that a subsequent consent was not voluntary. *See generally* 4 LaFave, *supra*, § 8.2(f).

A suspect's behavior may indicate consent even when verbal consent is withheld. *See Raines*, 55 Wn. App. at 462 (failure to expressly object after police requested permission to enter "to look around" amounted to implied waiver of right to exclude them); *State v. Sabbot*, 16 Wn. App. 929, 938, 561 P.2d 212, 218–19 (1977) (although the under-

cover investigator followed the defendant into the defendant's home after the defendant had told him to wait outside, the investigator's presence in house was with the defendant's tacit acquiescence).

5.12(g) Police Deception as to Identity or Purpose

The use of deception by a police officer does not necessarily affect the voluntariness of a consent to search. Police may use a ruse to gain entry to a residence to conduct a criminal investigation if they have a justifiable and reasonable basis to suspect criminal activity within the residence. *State v. Hastings*, 119 Wn.2d 229, 233, 830 P.2d 658, 660 (1992) (the defendant had no constitutionally protected expectation of privacy in the residence where undercover officers had purchased cocaine); *State v. Hashman,* 46 Wn. App. 211, 216, 729 P.2d 651, 655 (1986) (a police officer disguised as a building contractor gained entry into a residence after another officer, who had lawfully been within the residence, reported evidence of a marijuana-growing operation); *see also State v. Williamson*, 42 Wn. App. 208, 211–13, 710 P.2d 205, 207–08 (1985) (the fact that officers concealed their identity and intent to effect an arrest did not abrogate the validity of consent); *State v. Huckaby*, 15 Wn. App. 280, 285–88, 549 P.2d 35, 39–41 (1976). *See generally* 4 LaFave, *supra*, § 8.2 (m)–(n).

5.13 SCOPE OF CONSENT

A consensual search must be limited to the area covered by the authority given by the consenting party. *State v. Davis*, 86 Wn. App. 414, 423, 937 P.2d 1110, 1115 (1997). The scope of consent may be reduced in duration, area, or intensity by the express or implied limitation of the consenting party. *Id.* Any search exceeding the scope of consent is invalid, since exceeding the scope of consent is considered comparable to exceeding the scope of a search warrant. *Id.*; *see, e.g., State v. Hendrickson*, 129 Wn.2d 61, 72, 917 P.2d 563, 568–69 (1996) (consent to search a vehicle when used as transportation for a work release program did not extend to a time when defendant was no longer involved in program). *See generally* 4 Wayne R. LaFave, *Search and Seizure* § 8.1(a) (4th ed. 2004).

Although an object may be outside the limits of a valid consent, items may be seized so long as the requirements of the plain view doctrine are met. *See State v. Murray*, 84 Wn.2d 527, 534, 527 P.2d 1303, 1307 (1974) (when defendant consented to a search by officers who said they were looking only for office and video equipment, search could not include inspection of television serial numbers not in plain view); *State v.Cotten*, 75 Wn. App. 669, 683, 879 P.2d 971, 979 (1994) (shotgun dis-

covered during consensual search did not come within the plain view doctrine when it was not immediately apparent to FBI officers that the gun was evidence of a crime); *State v. Rodriguez*, 65 Wn. App. 409, 416–17, 828 P.2d 636, 640–41 (1992) (boots, towel, and shirt validly seized during a consensual search of an apartment); *supra* § 5.7 for discussion of the plain view doctrine.

Whether a consent to search applies to a later search depends on the time elapsed between the searches, whether the second search has the same objectives, and whether the search is conducted by the same officers. *State v. Koepke*, 47 Wn. App. 897, 905–06, 738 P.2d 295, 299–300 (1987) (warrant was based on observations made following valid third-party consent to search a room; later search validated by the original consent, even though the warrant was defective, because the second search was conducted by the same officer within 24 hours and with the same objective as the first search).

A general and unqualified consent to search an area for a particular type of material permits a search of personal property within the area in which the material could be concealed. For example, in *State v. Jensen*, 44 Wn. App. 485, 723 P.2d 443 (1986), the defendant consented to a "complete" search of his vehicle for materials of any evidentiary value. Officers conducting the search found cocaine in the pocket of a jacket found in the back seat of the defendant's car. *Id.* at 444. The court held that the officers did not exceed the scope of consent since the defendant had consented to the search for evidence of the size and nature of something that could reasonably be in the jacket pocket, and he never expressly or implicitly withheld consent to search his personal belongings in the car. *Id.* at 492; *see also State v. Mueller*, 63 Wn. App. 720, 723–24, 821 P.2d 1267, 1268–69 (1992) (search of vehicle, including trunk and gym bag, did not exceed scope of unlimited consent given by defendant). A consensual search is not invalidated if it results in the discovery of evidence that the consenting party did not expect to be discovered. *State v. Johnson*, 40 Wn. App. 371, 382–83, 699 P.2d 221, 229 (1985) (evidence of suspect's involvement in murder admissible after suspect signed a voluntary consent form permitting officers to search vehicle; record did not support suspect's claim that consent was limited to search for marijuana).

5.14 CONSENT BY THIRD PARTIES

Under appropriate circumstances, warrantless searches may be based upon the consent of third parties and evidence discovered during such searches may be used against a nonconsenting defendant. *See State v. Mathe*, 102 Wn.2d 537, 543, 688 P.2d 859, 862 (1984). While police

may legally retrieve and search voluntarily abandoned property, *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200, 203 (2001), they may not seize property found in a location where a third party gave consent to search if police caused that property to be abandoned because of an unlawful seizure of the property's owner. *State v. Reichenbach*, 153 Wn.2d 126, 136,101 P.3d 80, 87 (2004).

The validity of third-party consent is affected by both the relationship between the defendant and the third party and by other, more general considerations. The general considerations include the following: (1) the antagonism between the defendant and the third party, 4 Wayne R. LaFave, *Search and Seizure* § 8.3(b), at 149 (4th ed. 2004); (2) the specific instructions that the defendant may have given to the third party, *id.* § 8.3(b), at 152; and (3) the objection by the defendant when he or she was present at the time the third party authorized the search, *id.*, § 8.3(d), at 155.

Under the Fourth Amendment, third-party consent is analyzed under the "common authority" standard articulated in *United States v. Matlock*, 415 U.S. 164, 170, 94 S. Ct. 988, 993, 39 L. Ed. 2d. 242, 249 (1974). This standard has been adopted as the proper guide for analyzing questions of third-party consent under Article I, Section 7. *Mathe*, 102 Wn.2d at 543. Under this standard, (1) the consenting party must be able to permit the search in her own right and (2) it must be reasonable to find that the defendant had assumed the risk that a person with joint control might permit a search. *Id.* at 543–44; *see also State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079, 1082 (1998); *Cranwell v. Mesec*, 77 Wn. App. 90, 103–04, 890 P.2d 491, 499–500 (1995).

For a discussion of the significance of a police officer's reasonable mistake that the third party had authority over the place searched, see *United States v. Yarbrough*, 852 F.2d 1522 (9th Cir. 1988); *Schikora v. State,* 652 P.2d 473 (Alaska Ct. App. 1982). *See generally* 4 LaFave, *supra*, § 8.3(g).

The following sections discuss the relationships between a defendant and a third party that may give rise to third-party consent.

5.14(a) Defendant's Spouse

Washington cases involving spousal consent are consistent with the "common authority" approach of *Mathe*, 102 Wn.2d at 543. The defendant's spouse, having equal use of an object or equal right to occupation of the premises, may consent to a search of the object or premises. *See, e.g., State v. Gillespie*, 18 Wn. App. 313, 317, 569 P.2d 1174, 1176 (1977) (wife gave valid consent to search of husband's army field jacket); *see also Walker*, 136 Wn.2d at 679 (wife's consent to search of

home valid as to her, though invalid as to husband, who arrived prior to search and was neither asked for consent nor objected to search).

When police request entry pursuant to knock and talk in conducting a search pursuant to a warrant, *see supra* § 3.7, the admission of police by either spouse is valid. *See State v. Hartnell*, 15 Wn. App. 410, 417–18, 550 P.2d 63, 68–69 (1976) (wife's invitation to police officer to enter defendant's house in response to officer's request was consensual entry requiring no notice of authority or purpose be given to defendant, as ordinarily required under knock and announce statute or applicable constitutional provisions). *But see State v. Chichester*, 48 Wn. App. 257, 261, 738 P.2d 329, 332 (1987) (exigent circumstances needed to justify noncompliance with knock and announce rule). *See generally* 4 LaFave, *supra*, § 8.4(a).

5.14(b) Defendant's Parents

A parent has authority over all rooms of a house and, consequently, can consent to a search of a dependent child's room whether or not the child is a minor. *State v. Summers*, 52 Wn. App. 767, 772, 764 P.2d 250, 253 (1988); *see also State v. Cotten*, 75 Wn. App. 669, 685, 879 P.2d 971, 981 (1994) (where plain view exception did not apply, defendant's mother could give valid consent to seizure of shotgun found in defendant's room); *State v. Thompson*, 17 Wn. App. 639, 644, 564 P.2d 820, 823 (1977) (when defendant's mother, knowing that defendant was to be placed under arrest, consented without coercion to search of home in which she and defendant were living, consent was valid). When the child pays rent and the status of the parent is similar to that of a landlord rather than a custodial parent, the parent has no authority to consent to a search of a child's room. *Summers*, 52 Wn. App. at 771–73; *see also State v. Thompson*, 151 Wn.2d 793, 807, 92 P.3d 228, 235 (2004) (adult son living on a portion of his parents' property rent free did not have joint control over all his parents' property, and therefore police did not need to obtain his consent to search parents' boathouse that he used).

5.14(c) Defendant's Child

The defendant's child, in appropriate circumstances, may consent to police entry of the parent's home. *See, e.g., State v. Jones*, 22 Wn. App. 447, 451–52, 591 P.2d 796, 799 (1979) (reasoning that a minor child may consent to entry, but declining to rule on the legal question of consent to search). For a general discussion of the scope and limitations of a child's consent to a search of the parent's house, see generally 4 LaFave, *supra*, § 8.4(c).

5.14(d) Co-Tenant or Joint Occupant

A co-tenant or other joint occupant of the defendant's dwelling with common authority over or other sufficient relationship to the premises or effects sought to be inspected may give valid consent to a search of the premises or effects. *Matlock*, 415 U.S at 171, 94 S. Ct. at 993, 39 L. Ed. 2d at 249–50. The theory behind allowing such a search is that the parties have equal control over the premises and each assumes the risk that a cohabitant may permit a search of shared areas in the individual's absence. *Id.* at 169–71, 94 S. Ct. at 992–93, 39 L. Ed. 2d at 248–50; *Mathe*, 102 Wn.2d at 543 (quoting *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 993 n.7, 39 L. Ed. 2d at 250 n.7); *State v. Jeffries*, 105 Wn.2d 398, 414, 717 P.2d 722, 732 (1986) (common authority rule applicable to validate consent to search a "hobo" camp located outside the city of Wenatchee). *See generally* 4 LaFave, *supra*, § 8.5(c).

Under the common authority rule, once the police have obtained consent to search from an individual possessing equal control over the premises, the consent remains valid against a cohabitant who also possesses equal control, while the cohabitant is absent. *State v. Floreck*, 111 Wn. App. 135, 142–43, 43 P.3d 1264, 1268 (2002) (quadriplegic homeowner who had difficulty getting to all parts of the house gave valid consent for search of room used by the homeowner's brother, the defendant, who had placed a lock on the room without the homeowner's consent; defendant was not present at time of search). Washington courts have held that, if both cohabitants are present and able to object, the police must obtain consent from both residents in order for a search to be valid. *Id*; *see also State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035, 1040 (1989) (search invalid where premises of a business that defendant shared with his girlfriend were searched; girlfriend consented, but police failed to ask for defendant's consent when they realized he was present); *State v. Holmes*, 108 Wn. App. 511, 520–21, 31 P.3d 716, 721 (2001) (self-proclaimed coinhabitant's lack of key to residence should have alerted police to necessity of further inquiry as to whether she had proper authority to consent to search, given her interest in diverting attention away from her own criminal activity). *But see State v. Hoggatt*, 108 Wn. App. 257, 269, 30 P.3d 488, 494 (2001) (holding that a cohabitant could consent to police officers entering the living room, as opposed to a bedroom as in *Mathe* and *Walker* or a rear area of an office as in *Leach*, even when defendant was present and not objecting because it was an area that customarily receives visitors).

In some jurisdictions, the defendant's contemporaneous objections do not invalidate the consent of a cohabitant. *See, e.g., People v. Sanders*, 904 P.2d 1311, 1314–15 (Colo. 1995); *People v. Cosme*, 48 N.Y.2d

286, 292–93, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979). The dual consent rule for cohabitants has not been extended to the common authority shared by a driver and passenger in an automobile. *State v. Cantrell*, 124 Wn.2d 183, 192, 875 P.2d 1208, 1212–13 (1994) (passenger's consent to search automobile was sufficient to support warrantless search even though the defendant-driver did not consent to the search; court noted that a situation where a co-occupant overtly objected to search was not before the court).

5.14(e) Landlord, Lessor, or Manager

The lessor or manager of an apartment building may consent to a search of an area that is not within the lessee's exclusive possession. *See, e.g., State v. Kreck*, 86 Wn.2d 112, 123, 542 P.2d 782, 789 (1975) (search of rented half of garage upheld when police, with permission of rental manager, searched unrented half, pried off partition separating halves, and observed bottle of chloroform inside the partition); *State v. Talley*, 14 Wn. App. 484, 487, 543 P.2d 348, 351 (1975) (grounds outside apartment building were common areas not under exclusive control of defendant, and thus police could lawfully search grounds with consent of building manager). A landlord lacks authority to consent to a search when a tenant has the sole or undisputed possession of leased premises. *State v. Birdsong*, 66 Wn. App. 534, 537–39, 832 P.2d 533, 535–36 (1992). This rule applies as well to limited rental arrangements such as those found in motels, boarding homes, and room rentals. *Mathe*, 102 Wn.2d at 544; *see also* George L. Blum, Annotation, *Admissibility of Evidence Discovered in Warrantless Search of Rental Property Authorized by Lessor of Such Property—State Cases*, 61 A.L.R.5th 1, 124 (1998). Upon expiration of the tenancy, a tenant abandons his or her interest in the property and, likewise, an expectation of privacy. *State v. Christian*, 95 Wn.2d 655, 659, 628 P.2d 806, 808 (1981). *See generally* 4 LaFave, *supra*, § 8.5(a), at 214–15.

Tenants may consent to searches of common areas under the "common authority" rule, even over the objection of the landlord. *Cranwell*, 77 Wn. App. at 103–04. For additional discussion of consent by a lessee, see generally 4 LaFave, *supra*, § 8.5(b).

5.14(f) Bailee

A bailee may consent to a search of the bailor's belongings when the bailee has a sufficient relationship to or degree of control over the chattel. *See State v. Smith*, 88 Wn.2d 127, 139–40, 559 P.2d 970, 976 (1977) (when hospital had joint control over patient-defendant's clothing, hospital ward clerk could consent to police seizure of the clothing);

cf. State v. Bobic, 140 Wn.2d 250, 259, 996 P.2d 610, 616 (2000) (open view search of stolen goods through a preexisting hole between adjoining commercial storage units was valid when the manager gave police permission to enter). *See generally* 4 LaFave, *supra*, § 8.6(a). For a discussion of consent by a bailor, see generally 4 LaFave, *supra*, § 8.6(b).

5.14(g) Employee and Employer

Under some circumstances, an employee may give consent to a search of an employer's premises, and an employer may consent to a search of the place of employment, even when the belongings of an employee would be affected. Thus, under the common authority rule analysis, see *supra* § 5.14, an employer may validly consent to a search of that portion of the employer's premises used by an employee for personal purposes. *State v. Kendrick*, 47 Wn. App. 620, 632–33, 736 P.2d 1079, 1086 (1987) (defendant leased a "crash pad" on premises owned by his employer; employer controlled guard dogs on the premises, stored personal and business items there, had keys to the area, and allowed other employees to use the area). For a discussion of the rules governing consent within the employer-employee relationship, see generally 4 LaFave, *supra,* § 8.6(c)–(d).

5.14(h) Hotel Employee

A hotel or motel employee may not grant valid consent to a search of a guest's room because a motel guest generally has the same expectation of privacy during his or her tenancy as the renter of a private residence. *State v. Davis*, 86 Wn. App. 414, 419, 937 P.2d 1110, 1113 (1997); *see also Stoner v. California*, 376 U.S. 483, 489–90, 84 S. Ct. 889, 893, 11 L. Ed. 2d 856, 860–61 (1964); *State v. York*, 11 Wn. App. 137, 141, 521 P.2d 950, 952 (1974). The hotel guest's expectation of privacy generally expires at check-out time. *See Davis*, 86 Wn. App. at 419 (motel guest loses expectation of privacy at the expiration of tenancy unless late payment has been accepted by the motel or the motel has tolerated previous overtime stays).

5.14(i) Host and Guest

A host has the authority to consent to a search of a guest's bedroom and any other room occupied by the guest. *See State v. Rodriguez*, 65 Wn. App. 409, 414–15, 828 P.2d 636, 639–40 (1992) (mother could give valid consent for police search of apartment where son was a temporary guest; consent extended to bathroom occupied by defendant); *Koepke*, 47 Wn. App. at 903–04 (apartment tenant gave valid consent to a search of

the room in which defendant was residing as a guest; defendant paid no rent). *But see State v. Rison*, 116 Wn. App. 955, 962, 69 P.3d 362, 365–66 (2003), *review denied*, 151 Wn.2d 1008, 87 P.3d 1184 (2004) (tenant's consent to search did not authorize police to search a guest's eyeglass case, a closed container, when four to seven people were in the room when the officer arrived, and the officer did not ask for the guests to consent to the search of their personal property). For additional discussion, see generally 4 LaFave, *supra,* § 8.5(e). *See* common authority rule, *supra* § 5.14(d).

5.15 STATUTORY IMPLIED CONSENT

A statute may establish that particular conduct constitutes implied consent to a search. For example, drivers of motor vehicles in Washington give implied consent to a blood test if they are arrested for vehicular homicide. *State v. Brokman*, 84 Wn. App. 848, 850–51, 930 P.2d 354, 355–56 (1997); RCW 46.20.308(3).

5.16 EXIGENT CIRCUMSTANCES: INTRODUCTION

The exigent circumstances exception to the warrant requirement applies when police have established probable cause but do not obtain a warrant because the need for an immediate search or seizure makes it impractical to obtain a warrant. *See State v. Cardenas*, 146 Wn.2d 400, 405–06, 47 P.3d 127, 130 (2002); *State v. Hoffman*, 116 Wn.2d 51, 101, 804 P.2d 577, 603 (1991). Washington courts use the following six factors as a guide in determining whether exigent circumstances justify a warrantless entry and search:

(1) the gravity or violent nature of the offense with which the suspect is to be charged;

(2) whether the suspect is reasonably believed to be armed;

(3) whether there is reasonably trustworthy information that the suspect is guilty;

(4) whether there is strong reason to believe that the suspect is on the premises;

(5) the likelihood that the suspect will escape if not swiftly apprehended; and

(6) whether the entry is made peaceably.

Cardenas, 146 Wn.2d at 406 (citing *State v. Terrovona*, 105 Wn.2d 632, 644, 716 P.2d 295, 301 (1986)); *see Hoffman*, 116 Wn.2d at 101 (same factors used in determining justification of warrantless home arrest).

Not every factor must be met to find exigent circumstances, only those sufficient to show that the officers needed to act quickly. *Cardenas*, 146 Wn.2d at 408; *see, e.g., State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10, 13 (1989) (no one factor is conclusive; weight varies with circumstances); *State v. Flowers*, 57 Wn. App. 636, 644, 789 P.2d 333, 338 (1990) (the fact that some factors are not present is not controlling).

The courts have identified the following five situations where exigent circumstances are present: "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence." *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087, 1089–90 (1983); *see, e.g., State v. Carter*, 127 Wn.2d 836, 852–53, 904 P.2d 290, 297–98 (1995) (Alexander, J., dissenting) (exigent circumstances justified search of motel room when police were afraid that drugs inside room would be destroyed if the room's occupants were alerted to police presence by noises in hallway); *State v. Pressley*, 64 Wn. App. 591, 598, 825 P.2d 749, 753 (1992) (police may seize evidence without a warrant if probable cause exists and the actions of person detained give rise to a reasonable suspicion that evidence is in danger of being lost or destroyed); 2 Wayne R. LaFave, *Search and Seizure* § 4.1(b), at 447–48 (4th ed. 2004); *see also Carter*, 151 Wn.2d at 128 (holding, without deciding whether criminal investigators of a county prosecutor's office were state actors, that the investigators did not need a warrant to seize a gun placed in open view because of exigent circumstances); *State v. Stroud*, 106 Wn.2d 144, 147, 720 P.2d 436, 438 (1986); *Terrovona*, 105 Wn.2d at 644–45; *State v. Audley*, 77 Wn. App. 897, 907, 894 P.2d 1359, 1364 (1995); *Flowers*, 57 Wn. App. at 643–44. Exigent circumstances are not created merely because a serious offense has been committed. *See Thompson v. Louisiana*, 469 U.S. 17, 21, 105 S. Ct. 409, 411, 83 L. Ed. 2d 246, 250–51 (1984); *State v. Stevenson*, 55 Wn. App. 725, 732, 780 P.2d 873, 877 (1989); *see also Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290, 301 (1978); *Counts*, 99 Wn.2d at 59–61.

The exigent circumstances exception has been narrowly construed when the search requires intrusion into the human body, *Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 1835, 16 L. Ed. 2d 908, 919 (1966), or entry into private premises, *Payton v. New York*, 445 U.S. 573, 587–89, 100 S. Ct. 1371, 1380–81, 63 L. Ed. 2d 639, 651–52 (1980); *State v. Solberg*, 122 Wn.2d 688, 696–97, 861 P.2d 460, 465

(1993). At the same time, under the Fourth Amendment, the exception broadly encompasses searches of vehicles; thus, police may make a warrantless search of a vehicle even though the vehicle and its owner are in police custody. *Chambers v. Maroney*, 399 U.S. 42, 51–52, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428–29 (1970).

Article I, Section 7 of the Washington Constitution is not as broad as the federal constitution in its acceptance of automobile searches. The scope of the permissible search incident to arrest under the exigent circumstances exception is limited to the passenger compartment and any unlocked compartments or containers. *Stroud*, 106 Wn.2d at 152. Under this exception, the search is only permissible if conducted during the arrest process and immediately subsequent to the suspect's arrest and placement in the patrol car. *See id.*; 3 LaFave, *supra*, § 7.1, at 519–21.

When a crime is committed in the officer's presence after being admitted into a residence, exigent circumstances need not exist in order for the officer to lawfully make the arrest in the residence. *See State v. Dalton*, 43 Wn. App. 279, 286–87, 716 P.2d 940, 944 (1986). Thus, in *State v. Dalton*, an officer who had obtained entry into a student's college dormitory room under the pretense of buying drugs, but with the intent of making an arrest, could make a warrantless arrest under RCW 10.31.100, which provided for an arrest without a warrant where the police officer has reasonable cause to believe a felony has been or is being committed. *Id.*

5.17 EXIGENT CIRCUMSTANCES JUSTIFYING WARRANTLESS ENTRY INTO THE HOME

5.17(a) Hot Pursuit

An arrest on the street does not create an exigent circumstance justifying a warrantless search of an arrestee's house. *See Vale v. Louisiana*, 399 U.S. 30, 35, 90 S. Ct. 1969, 1972, 26 L. Ed. 2d 409, 414 (1970). Both the Fourth Amendment and Article I, Section 7 draw a firm line at the entrance of the house and "that threshold may not reasonably be crossed without a warrant." *State v. Holeman*, 103 Wn.2d 426, 429, 693 P.2d 89, 91 (1985) (quoting *Payton,* 445 U.S. 573, 590, 100 S. Ct. 1371, 1382, 63 L. Ed. 2d 639, 653 (1980)). However, police may make a warrantless entry into a home in the following circumstances: (1) when they attempt to arrest the suspect in a public place; (2) when the suspect retreats into the home; and (3) when the police reasonably fear that delay will result in the suspect's escape, in injury to the officers or to the public, or in the destruction of evidence. *See United States v. Weaklem*, 517 F.2d 70, 72 (9th Cir. 1975) (injury); *United States v. Bustamante-Gamez*,

488 F.2d 4, 8–9 (9th Cir. 1973) (escape; destruction of evidence); *Dorman v. United States*, 435 F.2d 385, 393 (D.C. Cir. 1970) (escape; destruction of evidence); *see also United States v. Santana*, 427 U.S. 38, 43–44, 96 S. Ct. 2406, 2410, 49 L. Ed. 2d 300, 306 (1976) (White, J., concurring); *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298–99, 87 S. Ct. 1642, 1645–46, 18 L. Ed. 2d 782, 787 (1967). While police are on the premises, the scope of the intrusion is limited to its purpose; if the purpose is to prevent escape or harm, for example, the search is limited to finding the suspect or weapons that could be used against the police. *Id.* at 299, 87 S. Ct. at 1646, 18 L. Ed. 2d at 787–88.

Washington courts have deemed that the location of the arrestee, not the location of the arresting officer, is critical for purposes of determining whether an arrest takes place in a home. *Holeman*, 103 Wn.2d at 429. Thus, absent exigent circumstances such as hot pursuit, an officer may not arrest a suspect without a warrant—and, subsequently, conduct a warrantless search incident to arrest—if the suspect is standing in the doorway to his or her home, even when the officer is outside the home. *Id.* However, the unenclosed front porch of a home is a public place for purposes of arrest once probable cause has been established. *State v. Solberg*, 122 Wn.2d 688, 699, 861 P.2d 460, 466 (1993). Therefore, a suspect who voluntarily exits his or her home onto the unenclosed porch may be arrested there, even in the absence of exigent circumstances. *See id.* at 700; *see also State v. Bockman*, 37 Wn. App. 474, 481, 682 P.2d 925, 931 (1984).

In determining whether a warrantless entry into a home is justified by a hot pursuit exigent circumstance, courts have focused on the immediate need to continue a promising criminal investigation, in addition to factors listed in *Cardenas*, *see supra* § 5.16, and have noted that the "exigency is said to be 'within the spirit, though not the text, of the "hot pursuit" exception.'" *State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10, 13 (1989) (citing *McCary v. Commonwealth*, 228 Va. 219, 228–29, 321 S.E.2d 637 (1984), and quoting *United States v. Robinson*, 533 F.2d 578, 583 (D.C. Cir. 1975)) (giving significant weight to the fact that a burglary took place only minutes before and the probability that the suspect was nearby in finding exigency to search a secured, parked, unoccupied car where there was no indication that the burglary suspect was armed); *see also Welsh v. Wisconsin*, 466 U.S. 740, 752–53, 104 S. Ct. 2091, 2099, 80 L. Ed. 2d 732,745 (1984) (warrantless search in home not justified by hot pursuit when police did not engage in immediate or continuous pursuit of defendant from the scene of the crime); *State v. Counts*, 99 Wn.2d 54, 60, 659 P.2d 1087, 1089 (1983) (no hot pursuit when police stood outside defendant's home for one hour after defendant

retreated therein). Other Washington cases involving hot pursuit include the following: *State v. Bessette*, 105 Wn. App. 793, 21 P.3d 318 (2001); *State v. Griffith*, 61 Wn. App. 35, 808 P.2d 1171 (1991) (escape, destruction of evidence); *State v. Hendricks*, 25 Wn. App. 775, 610 P.2d 940 (1980) (escape); *State v. Gallo*, 20 Wn. App. 717, 582 P.2d 558 (1978) (intent to kill).

5.17(b) Imminent Arrest

Even when a suspect has not been arrested, police may make a warrantless entry into a home when they reasonably believe that the suspect has been alerted to his or her imminent arrest and is likely to destroy evidence or escape. *United States v. Flickinger*, 573 F.2d 1349, 1356 (9th Cir. 1978), *overruled on other grounds by United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984). The exception also applies when the police reasonably believe that the suspects are armed or the crime for which they are to be arrested is one of violence. *Hayden*, 387 U.S. at 298–300, 87 S. Ct. at 1645–46, 18 L. Ed. 2d at 787; *Flickinger*, 573 F.2d at 1355–56; *Cardenas*, 146 Wn.2d at 412 (holding that officers were excused from complying with knock and announce statute where officers suspected defendants were dangerous, evidence was easily destructible, and officers observed defendants rushing toward back of the motel room following their knock). In addition, police may make a warrantless entry when they believe an accomplice has been alerted to the arrest of another accomplice, and the crime was one of violence. *State v. Reid*, 38 Wn. App. 203, 209–10, 687 P.2d 861, 866 (1984). Police may not, however, make a warrantless entry when the likelihood of escape is slight, the offense is minor, and the police do not believe that the suspect is armed. *State v. Dresker*, 39 Wn. App. 136, 139–40, 692 P.2d 846, 849 (1984).

Probable cause to believe a home contains contraband does not constitute an exigent circumstance justifying the absence of a warrant; police must have reason to believe the contraband will be destroyed before they are able to obtain a warrant. *See United States v. Rubin*, 474 F.2d 262, 268–69 (3d Cir. 1973); *cf. State v. Carter*, 127 Wn.2d 836, 840, 904 P.3d 290, 292 (1995) (exigent circumstances justified warrantless entry of motel room where there was a risk of drugs being destroyed if persons in motel room were alerted to police presence by noises and scuffle in hallway); *State v. Drumhiller*, 36 Wn. App. 592, 596–97, 675 P.2d 631, 633–34 (1984) (exigent circumstances existed when police observed occupants in the process of inhaling what police reasonably believed to be cocaine); *State v. Jeter*, 30 Wn. App. 360, 362, 634 P.2d 312, 314 (1981) (presence of easily disposable contraband does

not itself constitute exigent circumstances justifying noncompliance with knock and announce statute).

5.18 EXIGENT CIRCUMSTANCES JUSTIFYING WARRANTLESS SEARCH AND SEIZURE OF THE PERSON

Warrantless searches and seizures of persons may be justified by the exigent circumstances exception when police reasonably fear injury to themselves or others, flight, or the destruction of evidence. *See, e.g., Illinois v. McArthur*, 531 U.S. 326, 331–333, 121 S. Ct. 946, 950–51, 148 L. Ed. 2d 838, 848–49 (2001) (brief seizure of person outside his home permissible when police had probable cause to believe the home contained illegal drugs and police had reasonable belief that person could destroy evidence before police obtained a search warrant); *Ybarra v. Illinois*, 444 U.S. 85, 92–93, 100 S. Ct. 338, 343, 62 L. Ed. 2d 238, 246–47 (1979) (pat-down search unconstitutional absent reasonable belief that suspect was armed and currently dangerous); *Schmerber v. California*, 384 U.S. 757, 770–71, 86 S. Ct. 1826, 1835–36, 16 L. Ed. 2d 908, 919–20 (1996); *see also* Michael Gall, Note, *Illinois v. McArthur: Forcing Consent and Creating a "Backdoor" to the Warrant Requirement for the Home,* 35 U. Tol. L. Rev. 455 (2003). *But see State v. King*, 89 Wn. App. 612, 618–19, 949 P.2d 856, 860 (1998) ("[E]ven without probable cause or reasonable suspicion of criminal activity, it is reasonable for an officer executing a search warrant at a residence to briefly detain occupants of that residence, to insure officer safety and an orderly completion of the search."). See *supra* § 1.4 for definition of what constitutes a seizure.

Police officers in Washington can engage in fresh pursuit of anyone "who is reasonably believed to have committed a violation of traffic or criminal laws." RCW 10.93.070(6), .120. *But see State v. Rehn*, 117 Wn. App. 142, 149, 69 P.3d 379, 381 (2003) (noting that "[a]pparently, barring exceptional circumstances, a passenger is free to walk away from or stay at the traffic stop scene"). The statutory definition of "fresh pursuit" relies in part on the common law. *City of Tacoma v. Durham*, 95 Wn. App. 876, 878–79, 978 P.2d 514, 516 (1999); RCW 10.93.120. The court in *City of Wenatchee v. Durham*, 43 Wn. App. 547, 718 P.2d 819 (1986), identified the following five criteria to be used when analyzing fresh pursuit:

> (1) that a felony occurred in the jurisdiction; (2) that the individual sought must be attempting to escape to avoid arrest or at least know he is being pursued; (3) that the police pursue without unnecessary delay; (4) that the pursuit must be continuous and uninterrupted, though there need not be continuous surveillance of the suspect nor uninterrupted knowledge of his location; and (5) that there be a rela-

> tionship in time between the commission of the offense, commencement of the pursuit, and apprehension of the suspect.

Id. at 550–51.

However, under RCW 10.93, which took effect as part of the Washington Mutual Aid Peace Officers Powers Act after *Wenatchee*, "courts are not limited by the common law definition, but may consider the [l]egislature's overall intent to use practical considerations in deciding whether a particular arrest across jurisdictional lines was reasonable." *Vance v. Dep't of Licensing*, 116 Wn. App. 412, 416, 65 P.3d 668, 669 (2003), *review denied*, 150 Wn.2d 1004, 77 P.3d 651 (2003) (quoting *Durham*, 95 Wn. App. at 881).

Warrantless search issues generally do not arise with respect to an arrestee because the warrantless search of an arrestee may be justified as incident to arrest. *See* 3 Wayne R. LaFave, *Search and Seizure* § 5.1, at 4 (4th ed. 2004). Exigent circumstances are used to justify the following two other kinds of warrantless searches of persons: searches that penetrate the body, such as blood tests and other invasive medical procedures, and searches of persons located on the premises being searched.

5.18(a) Warrantless Searches Involving Intrusion into the Body

For a medical procedure to be performed without a warrant and justified by exigent circumstances, the test selected to obtain evidence must be reasonable. *Schmerber*, 384 U.S. at 767–68, 86 S. Ct. at 1834, 16 L. Ed. 2d at 917–18; *see* 3 LaFave, *supra*, § 5.3(c), at 171–72. In addition, the State must show more than probable cause because of the severity of the search, and the method used to obtain the evidence must be reasonable. *Schmerber*, 384 U.S. at 770–72, 86 S. Ct. at 1835–36, 16 L. Ed. 2d at 919–20; *State v. Young*, 15 Wn. App. 581, 584–85, 550 P.2d 689, 691–92 (1976) (police may use reasonable force to constrict throat to prevent swallowing).

Where a serious crime involving intoxication is at issue, the natural dissipation of alcohol in the blood of a suspect is an exigent circumstance justifying the nonconsensual extraction of a blood sample to determine the suspect's blood alcohol level. *Schmerber*, 384 U.S. at 770–71, 86 S. Ct. at 1835–36, 16 L. Ed. 2d at 919–20. Blood tests without a warrant have been upheld as reasonable searches under both the Fourth Amendment and Article I, Section 7 as long as the test is performed in a reasonable manner by a trained paramedic. *State v. Curran*, 116 Wn.2d 174, 185, 804 P.2d 558, 564 (1991), *abrogated on other grounds*, *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997). In Washington, blood tests for alcohol intoxication are also justified by statutory implied consent under RCW 46.20.308(3). *Curran*, 116 Wn.2d at 185 (no violation of Article I,

Section 7 when a blood sample is taken pursuant to RCW 46.20.308(3)); *see also State v. Baldwin*, 109 Wn. App. 516, 518, 37 P.3d 1220, 1222 (2001) (holding that Washington's implied consent statute, RCW 46.20.308, authorizes a police officer who reasonably believes that a driver is under the influence of alcohol or drugs to ask the driver to take a breath or blood test) (emphasis added). *But see State v. Wetherell*, 82 Wn.2d 865, 870–71, 514 P.2d 1069, 1073 (1973) (lawful arrest of motorist is a prerequisite for operation of implied consent statute; express consent is required for blood test of motorist who is not under arrest). Similarly, the exigent circumstance of dissipation of blood alcohol has also been used to justify a warrantless and nonconsensual entry into a residence to arrest a suspect and seize a blood sample. *State v. Komoto*, 40 Wn. App. 200, 211–13, 697 P.2d 1025, 1032–33 (1985) (officer used a passkey to enter apartment and arrest suspect following felony hit and run). The fact that evidence is likely to be destroyed will not automatically justify an intrusive medical procedure, even when a warrant is obtained; the evidence must be essential to a conviction. *See Winston v. Lee*, 470 U.S. 753, 765–66, 105 S. Ct. 1611, 1619–20, 84 L. Ed. 2d 662, 672–73 (1985) (no need to retrieve bullet from defendant's body under circumstances where other substantial evidence was available to convict him).

In order to deter recidivism and identify persons who commit crimes, no warrant is required under the Fourth Amendment to collect a DNA sample from every adult or juvenile convicted of a felony, stalking, harassment, communicating with a minor for immoral purposes, or adjudicated guilty of an equivalent juvenile offense. *See State v. Surge*, 122 Wn. App. 448, 94 P.3d 345, 347 (2004) (holding that *State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993), is controlling on this issue and binding on this court); RCW 43.43.754(1).

5.18(b) Warrantless Searches and Seizures of Persons Located on Premises Being Searched

When a search warrant for premises is being executed, police may conduct a warrantless search of a person located on the premises if they have "reasonable cause" to believe that the person is concealing evidence sought and immediate seizure is necessary to prevent its destruction. *State v. Halverson*, 21 Wn. App. 35, 38, 584 P.2d 408, 410 (1978) (although a specific warrant to search premises cannot automatically be converted into a general one to search individuals, defendant's suspicious conduct gave the police reasonable cause to search his person). For a more complete discussion of when occupants may be searched during the execution of a search warrant for premises, see 2 LaFave, *supra*, § 4.9.

5.19 EXIGENT CIRCUMSTANCES JUSTIFYING ENTRY INTO THE HOME OR SEARCH OF THE PERSON: ABSENCE OF LESS INTRUSIVE ALTERNATIVES

Courts have held warrantless home entries illegal when police could have kept the residence under surveillance until a warrant was obtained. *State v. Bessette*, 105 Wn. App. 793, 799–800, 21 P.3d 318, 321 (2001) (no exigent circumstances existed when officer, in pursuit of a minor who committed a gross misdemeanor in officer's presence, entered a home without warrant when suspect "was hardly a threat to the health, safety, or welfare of citizens," not likely to escape without being swiftly apprehended, homeowner insisted on a search warrant, and officer could simply have obtained a telephone warrant to search and arrest minor); *State v. Werth*, 18 Wn. App. 530, 536–37, 571 P.2d 941, 944–45 (1977); *cf. People v. Vogel*, 58 Ill. App. 3d 910, 374 N.E.2d 1152, 16 Ill. Dec. 377 (1978) (when threat of destruction of evidence in locker was minimal or nonexistent and could be thwarted by stationing officer at locker while warrant was obtained, warrantless search was not justified); *State v. Allen*, 508 P.2d 472 (Or. App. Ct. 1973) (when no one who could dispose of contraband remained on premises, police should secure premises by stationing guard while search warrant is obtained); *State v. McKenzie*, 12 Wn. App. 88, 528 P.2d 269 (1974) (when police officers watched defendant's house while other officers applied for search warrant, and when defendant drove car out of garage, was approached by police, and then sounded his horn, the officers were permitted to immediately enter the house in order to detain occupants, provided the officers refrained from searching the house until the search warrant was issued); *State v. Peele*, 10 Wn. App. 58, 516 P.2d 788 (1973) (search warrant necessary when the suspect was not fleeing, but might be expected to hide out on the premises until morning). *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 6.5(c) (4th ed. 2004) (discussing the impoundment alternative).

Similarly, the police may be required to keep occupants under surveillance, instead of searching them, until a warrant is procured. *See, e.g., United States v. Grummel*, 542 F.2d 789 (9th Cir. 1976); *United States v. Rosselli*, 506 F.2d 627, 629–30 (7th Cir. 1974) (police failure to apply for warrant was unlawful when police could have stationed officer with informant to prevent him from calling and warning defendant of imminent search); *State v. Lewis*, 19 Wn. App. 35, 40, 573 P.2d 1347, 1350 (1978). Police may use methods not involving any searching activity to secure premises in which they are legally present while awaiting the issuance of a search warrant. *Illinois v. McArthur*, 531 U.S. 326, 331–33, 121 S. Ct. 946, 950–51, 148 L. Ed. 2d 838, 848–49 (2001) (brief seizure of defendant while awaiting the issuance of a search warrant for

his home was permissible because (1) police had probable cause to believe that defendant's home contained unlawful drugs; (2) police had good reason to fear that, unless restrained, defendant would destroy the drugs before they could return with a warrant; (3) police merely prevented defendant from entering home unaccompanied, and they neither searched the trailer nor arrested defendant before obtaining a warrant; and (4) police imposed the restraint for a limited period of time, namely, two hours); *State v. Terrovona*, 105 Wn.2d 632, 645–46, 716 P.2d 295, 302 (1986) (prior warrantless entry and arrest of defendant in his residence was justified by exigent circumstances; nothing observed by the police contributed to the issuance of the search warrant, nor was anything in "plain view" used as evidence).

A suspect attempting to swallow evidence may create an exigent circumstance justifying efforts to prevent the swallowing, even when the evidence could be expected to pass through the digestive system and be recovered. *State v. Taplin*, 36 Wn. App. 664, 665–67, 676 P.2d 504, 506 (1984).

5.20 Exigent Circumstances Justifying Warrantless Search and Seizure of Containers

Generally, a container may be seized without a warrant when there is probable cause to believe it is evidence of a crime; the container's mobility is the exigent circumstance permitting the warrantless seizure. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S. Ct. 1297, 1300, 143 L. Ed. 2d 408, 414–15 (1999); *State v. Jackson*, 82 Wn. App. 594, 606–07, 918 P.2d 945, 952 (1996), *review denied*, 131 Wn.2d 1006, 932 P.2d 644 (1997) (positive reaction by dog trained to discover drugs established probable cause justifying seizure of package). A warrantless search of the container's contents, however, is permissible only if delay would diminish the evidentiary value of the contents, prevent the apprehension of suspects, or endanger the public. *United States v. Chadwick*, 433 U.S. 1, 14–15, 97 S. Ct. 2476, 2485, 53 L. Ed. 2d 538, 550 (1997); *State v. McAlpin*, 36 Wn. App. 707, 716, 677 P.2d 185, 191 (1984) (public safety emergency justified search of briefcase in order to locate a missing gun); *see also State v. Smith*, 88 Wn.2d 127, 137–38, 559 P.2d 970, 975 (1977); *State v. Wolfe*, 5 Wn. App. 153, 486 P.2d 1143 (1971). Once the container is in the officer's exclusive control, there is no danger of removal, and exigent circumstances no longer justify a warrantless search of the contents. *See, e.g., United States v. Van Leeuwen*, 397 U.S. 249, 90 S. Ct. 1029, 25 L. Ed. 2d 282 (1970); *State v. Johnston*, 31 Wn. App. 889, 891–92, 645 P.2d 63, 64 (1982) (seizure of purse valid, but subsequent search without a warrant was illegal); *State v. Moore*, 29 Wn.

App. 354, 628 P.2d 522 (1981) (warrantless seizure of luggage proper, but warrantless search unlawful); *cf. State v. Kealey*, 80 Wn. App. 162, 170, 907 P.2d 319, 324 (1995), *review denied*, 129 Wn.2d 1021, 919 P.2d 599 (1996) ("Purses, briefcases, and luggage constitute traditional repositories of personal belongings protected under the Fourth Amendment."). *But see State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887, 891 (2004) (a gun is not like a purse, briefcase, or luggage, in which belongings are stored or things are kept from public view; there is no privacy interest in a firearm or the interior of a firearm that has been placed in public view).

When a container is found in an automobile, the rule requiring a warrant for the search of a container's contents does not apply if police have probable cause to search the vehicle, and police may open containers discovered during a search so long as the container is large enough to conceal the object of the search. *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982); *see also Houghton*, 526 U.S. at 300, 119 S. Ct. at 1300, 143 L. Ed. 2d at 414–15; *United States v. Johns*, 469 U.S. 478, 105 S. Ct. 881, 83 L. Ed. 2d 890 (1985). *See generally* 3 Wayne R. LaFave, *Search and Seizure* § 5.5 (4th ed. 2004).

A warrantless inspection or testing of a container's contents is not always considered a search. When the only fact that can be gleaned from an inspection or test is whether the contents are contraband, the Fourth Amendment is not implicated. *United States v. Jacobsen*, 466 U.S. 109, 123, 104 S. Ct. 1652, 1661–62, 80 L. Ed. 2d 85, 100 (1984) (chemical test that merely discloses whether a particular substance is cocaine does not compromise any legitimate interest in privacy); *accord State v. Bishop*, 43 Wn. App. 17, 20, 714 P.2d 1199, 1200 (1986) (subjecting suspicious substance to chemical analysis to determine identity does not invade privacy interests). Thus, a canine sniff does not constitute a search under the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 707, 103 S. Ct. 2637, 2644–45, 77 L. Ed. 2d 110, 121 (1983) (trained narcotics dog sniffing exterior of luggage does not constitute a search). For a discussion of canine sniffs under Article I, Section 7, see *State v. Boyce*, 44 Wn. App. 724, 723 P.2d 28 (1986) (canine sniff of air outside suspect's bank safe deposit box; court suggests Article I, Section 7 requires a case-by-case examination of the circumstances in order to determine whether a canine sniff is a search). *See generally* 1 LaFave, *supra*, § 2.2(g). See *State v. Courcy*, 48 Wn. App. 326, 739 P.2d 98, 102 (1987), for an application of the single purpose container rule in Washington. *See also* 3 LaFave, *supra*, § 5.5(f), at 249.

5.21 WARRANTLESS SEARCHES AND SEIZURES OF MOTOR VEHICLES

Automobiles and other motor vehicles are treated as a special category in search and seizure law for two reasons: First, the reasonable expectation of privacy in a vehicle is less than that in a home or on a person; second, the mobility of a vehicle may make obtaining a warrant prior to a search or seizure impractical. *See Illinois v. Lidster*, 540 U.S. 419, 424, 124 S. Ct. 885, 889, 157 L. Ed. 2d 843, 851 (2004) ("The Fourth Amendment does not treat a motorist's car as his castle."); *California v. Carney*, 471 U.S. 386, 392–93, 105 S. Ct. 2066, 2069–70, 85 L. Ed. 2d. 406, 414 (1985) (privacy expectation in vehicles is less than in homes because of pervasive government regulation of driving and roads); *State v. Johnson*, 128 Wn.2d 431, 449, 453–54, 909 P.2d 293, 303, 306 (1996); *see also Chambers v. Maroney*, 399 U.S. 42, 49, 90 S. Ct. 1975, 1980, 26 L. Ed. 2d 419, 427 (1970). Under both the Fourth Amendment and Article I, Section 7, the fact that it is possible to sleep in a vehicle does not give rise to the same privacy rights that attach to fixed dwellings. *Carney*, 471 U.S. at 393, 105 S. Ct. at 2070, 85 L. Ed. 2d at 414 (motor home is treated like a vehicle when it is mobile); *Johnson*, 128 Wn.2d at 449 (lessened privacy interest for sleeper compartment of a tractor-trailer rig); *State v. Cantrell*, 124 Wn.2d 183, 190, 875 P.2d 1208, 1211–12 (1994) (there exists "less expectation of privacy in an automobile than in either a home or an office"). The reasonable expectation of privacy in motor vehicles is discussed in 3 Wayne R. LaFave, *Search and Seizure* § 7.2(b), at 548–61 (4th ed. 2004).

The following sections, 5.22 to 5.29, focus on the warrantless search or seizure of a vehicle and its contents when police have probable cause to believe the vehicle contains evidence of a crime. Vehicles may also be the subject of a warrantless search when the circumstances of the search are consistent with other exceptions to the warrant requirement, such as the search incident to arrest, or the *Terry* stop and frisk exceptions. *See* 3 LaFave, *supra*, § 7.1, at 502; *see also* 2 LaFave, *supra*, § 4.9(d) (discussing the *Terry* stop-and-frisk search).

5.22 SEARCHES AND SEIZURES OF VEHICLES UNDER THE FOURTH AMENDMENT

The search of a motor vehicle and its contents is treated differently under the Fourth Amendment than it is under Article I, Section 7 of the Washington Constitution. *Compare New York v. Belton*, 453 U.S. 454, 460–61, 101 S. Ct. 2860, 2864, 69 L. Ed. 2d 768, 774–76 (1981) (holding that police may, as a contemporaneous incident of lawful custodial arrest of occupants in automobile, search passenger compartment and contents of any container in passenger compartment) *with State v.*

Stroud, 106 Wn.2d 144, 148–52, 720 P.2d 436, 438–40 (1986) (holding that, in warrantless search of automobile, actual exigent circumstances must be balanced against whatever privacy interests individual has in articles in vehicle). The next section sets forth federal and state law governing searches and seizures of automobiles and their contents. It then addresses the general principles governing automobile impoundment and inventory searches.

5.22(a) Probable Cause to Search a Vehicle: The Carroll *Rule*

The *Carroll* rule states that, under the Fourth Amendment, police may conduct a warrantless search of an automobile when there is probable cause to believe that the vehicle contains contraband or evidence. *Carroll v. United States*, 267 U.S. 132, 153–54, 45 S. Ct. 280, 285, 69 L. Ed. 543, 551 (1925); *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014, 144 L. Ed. 2d 442, 445 (1999) (holding that there is no need for a separate finding of exigency in addition to a finding of probable cause); *Chambers v. Maroney*, 399 U.S. 42, 51–52, 90 S. Ct. 1975, 1981, 26 L. Ed. 2d 419, 428 (1970); *State v. Huff*, 64 Wn. App. 641, 648–49, 826 P.2d 698, 702 (1992). A warrantless search is permissible under the *Carroll* rule because an automobile's mobility creates an exigency: The contraband or evidence could be transported out of the jurisdiction while officers are applying for a warrant. *Carroll*, 267 U.S. at 153, 45 S. Ct. at 285, 69 L. Ed. at 551.

The special treatment of automobiles has been extended to permit the warrantless search of a vehicle's trunk when the police reasonably believe that the trunk contains weapons and the vehicle is vulnerable to vandalism. *Cady v. Dombrowski*, 413 U.S. 433, 448, 93 S. Ct. 2523, 2531, 37 L. Ed. 2d 706, 718 (1973) (holding that, in cases where suspect's vehicle had been disabled in an accident and subsequently towed to a private garage, suspect's vehicle can be searched without a warrant). Similarly, police may make a warrantless search of a vehicle's trunk when they reasonably believe a suspect may be hiding in it. *State v. Silvernail*, 25 Wn. App. 185, 191, 605 P.2d 1279, 1283 (1980).

5.22(b) Application of the Carroll *Rule When Actual Exigency Is Removed*

The *Carroll* rule permits a warrantless search even after a vehicle has been taken into police custody and its contents are in no danger of removal or disturbance. *Florida v. Meyers*, 466 U.S. 380, 382, 104 S. Ct. 1852, 1853, 80 L. Ed. 2d 381, 384 (1984); *Chambers*, 399 U.S. at 51–52, 90 S. Ct. at 1981, 26 L. Ed. 2d at 428–29 (actual exigent circumstances not necessary to justify warrantless probable cause search). The rationale

is that the initial justification for the warrantless search does not disappear after impoundment. *United States v. Johns*, 469 U.S. 478, 484, 105 S. Ct. 881, 885, 83 L. Ed. 2d 890, 897 (1995). The vehicle, however, must have been initially mobile or readily mobile at the time of arrest for the *Carroll* rule to apply. *Coolidge v. New Hampshire*, 403 U.S. 443, 460–62, 91 S. Ct. 2022, 2034–36, 29 L. Ed. 2d 564, 579–81 (1971) (holding that warrant was required when defendant had already been arrested, his car was located in his driveway, no other individual was available to move the car, and police already had established probable cause to search the car); *see also California v. Carney*, 471 U.S. 386, 390–91, 105 S. Ct. 2066, 2068–69, 85 L. Ed. 2d 406, 412–13 (1985).

The constitutional limits on the number of warrantless searches and the length of time that may elapse before police are required to obtain a warrant have not been clarified. *See Johns*, 469 U.S. at 484–88, 105 S. Ct. at 886–87, 83 L. Ed. 2d at 897–99 (upholding the warrantless search of containers in a vehicle under the *Carroll* rule when the containers were stored in a government warehouse for three days prior to the search).

5.22(c) Permissible Scope of Search or Seizure Under Carroll*: The Vehicle Itself and Containers Within the Vehicle*

When police have probable cause to believe that a vehicle contains contraband, they may conduct a warrantless search "of the same scope as could be authorized by a magistrate." *Johns*, 469 U.S. at 483, 105 S. Ct. at 885, 83 L. Ed. 2d at 896 (citing *United States v. Ross*, 456 U.S. 798, 825, 102 S. Ct. 2157, 2171–72, 72 L. Ed. 2d 572, 594 (1982)). Thus, when the exact location of the contraband within the vehicle is not known, police may conduct a warrantless search not only of the vehicle itself, but also of any of its contents, including locked and unlocked containers. *Ross,* 456 U.S. at 821, 825, 102 S. Ct. at 2171, 2173, 72 L. Ed. 2d at 592, 594. Formerly, police were required to obtain a warrant in order to search a container found in a motor vehicle if the probable cause to search was directed only at the container and not the car itself. *Arkansas v. Sanders*, 442 U.S. 753, 765, 99 S. Ct. 2586, 2594, 61 L. Ed. 2d 235, 246 (1979); *United States v. Chadwick*, 433 U.S. 1, 13, 97 S. Ct. 2476, 2484–85, 53 L. Ed. 2d 538, 549–50 (1977). Currently, however, when police have probable cause to believe that the contraband is hidden within a particular container and the container is placed inside a vehicle, probable cause automatically extends to the entire vehicle. *California v. Acevedo*, 500 U.S. 565, 579, 111 S. Ct. 1982, 1991, 114 L. Ed. 2d 619, 634 (1991); *see also Illinois v. Caballes*, ___ U.S. ___, ___, 125 S. Ct. 834, 837–38, 160 L. Ed. 842 (2005) (warrantless search of car trunk

valid where narcotics-detection dog detected drugs inside the trunk when police lawfully pulled the car over for a traffic stop). Further, the United States Supreme Court has held that, even prior to arrest, police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295, 307, 119 S. Ct. 1297, 1304, 143 L. Ed. 2d 408, 419 (1999). In other words, if the police have probable cause to believe contraband or evidence of a crime is present anywhere inside a vehicle, they may search the entire automobile and any containers within it. *See id.* The scope of the permissible search is limited to the size and shape of the items sought and police may only search where it is reasonable to believe the items sought may be hidden. *See id.* Note that *Acevedo* and *Ross* apply only in the context of the automobile exception, and a legitimate expectation of privacy in closed containers is retained outside of the context of motor vehicles.

5.23 SEARCHES AND SEIZURES OF VEHICLES UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION

While the Fourth Amendment allows police to search anything in a vehicle when there is probable cause to believe that the vehicle contains contraband or evidence, *Maryland v. Dyson*, 527 U.S. 465, 467, 119 S. Ct. 2013, 2014, 144 L. Ed. 2d 442, 445 (1999), the Washington Constitution provides greater protection against the warrantless search of an automobile. *State v. Hendrickson*, 129 Wn.2d 61, 69–70 n.1, 917 P.2d 563, 567–68 n.1 (1996). Under Article I, Section 7, a warrantless vehicle search incident to an arrest must occur immediately following the arrest of the occupant of a vehicle. *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436, 441 (1986); *State v. Perea*, 85 Wn. App. 339, 343–44, 932 P.2d 1258, 1260 (1997); *see also State v. Cass*, 62 Wn. App. 793, 795–96, 816 P.2d 57, 58–59 (1991) (search of passenger compartment valid if immediately subsequent to arresting, handcuffing, and placing suspect in police car); *State v. Fore*, 56 Wn. App. 339, 347, 783 P.2d 626, 631 (1989) (for search to be valid, arrest must be sufficiently proximate, both temporally and physically, to lawful arrest).

Under the heightened privacy protection of Article I, Section 7, the warrantless search incident to arrest of locked containers located in the passenger compartment is prohibited. *Stroud*, 106 Wn.2d at 152. This is in contrast to the federal standard, which permits the warrantless search incident to arrest of both locked and unlocked containers. *See* 3 Wayne R. LaFave, *Search and Seizure* § 7.1(c), at 519–521 (4th ed. 2004). "The rationale for this departure from the federal standard is that use of a lock demonstrates the individual's expectation of privacy and the presence of

a lock minimizes the danger of an arrestee gaining access to the contents of the container." *State v. Johnson*, 77 Wn. App. 441, 446, 892 P.2d 106, 109 (1995) *aff'd*, 128 Wn.2d 431, 909 P.2d 293 (1996) (discussing *Stroud*, 106 Wn.2d 144). Therefore, police in Washington must obtain a search warrant prior to searching any locked glove compartment or other locked container.

5.24 WARRANTLESS VEHICLE SEARCHES BASED ON GENERALIZED SUSPICION

5.24(a) Spot Checks of Motorists

In the absence of a valid spot check program, police officers may stop a motor vehicle to check for valid registration or possible automobile violations only when they have a reasonable suspicion of unlawful activity. *Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979) (randomly stopping drivers to check registration violated the Fourth Amendment). To determine the reasonableness of spot checks or vehicle checkpoints, the court will weigh the government's interest in the checkpoints, the extent to which the program advances the government's goals, and the amount of intrusion on the individual motorist. *Illinois v. Lidster*, 540 U.S. 419, 427, 124 S. Ct. 885, 890, 157 L. Ed. 2d 843, 852 (2004); *State v. Marchand*, 104 Wn.2d 434, 441, 706 P.2d 225, 228 (1985) (safety spot check invalid under the Fourth Amendment). For police to institute general spot check procedures, the procedures must constitute "a sufficiently productive mechanism to justify the intrusion." *Marchand*, 104 Wn.2d at 437. In addition, the spot check procedures must be such that "the exercise of discretion by law enforcement officials [is] sufficiently constrained." *Id.* at 438; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 48, 121 S. Ct. 447, 458, 148 L. Ed. 2d 333, 347–48 (2000) (holding that, absent individualized suspicion, a highway drug checkpoint is unconstitutional where officers and drug-detecting canine would examine, through open view, a predetermined number of drivers); *Seattle v. Mesiani*, 110 Wn.2d 454, 459–60, 755 P.2d 775, 778 (1988) (Seattle's sobriety checkpoint program improperly "gave police officers unbridled discretion to conduct intrusive searches" with no statutory constraints and the program involved extensive invasions of privacy, such as smelling suspects' breath, visual checks of automobiles for open containers, and physical tests designed to elicit evidence of dexterity); *cf. Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) (sobriety checkpoint where all vehicles were briefly detained did not violate the Fourth Amendment).

The Washington Supreme Court has held sobriety checkpoint programs unconstitutional under both Article I, Section 7 and the Fourth Amendment. *Mesiani*, 110 Wn.2d at 458, 460. Relying on Article I, Section 7's explicit recognition of the privacy rights of the state's citizens and requirements that all searches be conducted under "authority of law," the court rejected the city's argument that the stops fell within an exception to the warrant requirement. *Id.* at 457–58. In one of the cases relied upon by the city, *State v. Silvernail*, 25 Wn. App. 185, 605 P.2d 1279 (1980), the court permitted a warrantless search when there was information that a serious felony had been recently committed. *Id.* at 190. The *Mesiani* court distinguished *Silvernail*, stating that notice that a felony had recently been committed "is far different from an inference from statistics that there are inebriated drivers in the area." *Mesiani*, 110 Wn.2d at 458 n.1. *But see Ingersoll v. Palmer*, 43 Cal. 3d 1321, 1331, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987).

The California Supreme Court used the "administrative search" doctrine to decide that sobriety checkpoints pass constitutional muster so long as they are properly designed and operated. *Id.* at 1306. Such checkpoints are intended primarily to deter intoxicated motorists from taking to the road, not to discover evidence of crimes, and therefore may be characterized as administrative searches that require no individualized suspicion of illegal conduct. *Id.* at 1306–08. *See generally* 5 Wayne R. LaFave, *Search and Seizure* § 10.8(d) (4th ed. 2004).

5.25 WARRANTLESS SEARCHES OF VEHICLES SUSPECTED OF BEING THE SUBJECT OF CRIMINAL ACTIVITY

Police officers may make a limited entry and investigation into a vehicle that they have probable cause to believe has been the subject of a burglary, tampering, or theft. *State v. Lynch*, 84 Wn. App. 467, 477–78, 929 P.2d 460, 465 (1996). Officers may search those areas they reasonably believe to have been affected and those areas reasonably believed to contain some evidence of ownership. *Id.* at 477–78; *see also State v. Orcutt*, 22 Wn. App. 730, 734–35, 591 P.2d 872, 875 (1979) (valid warrantless entry into vehicle to look in places where registration papers might be kept if driver has fled vehicle and officer reasonably believed vehicle had been stolen); *cf. Arizona v. Taras*, 19 Ariz. App. 7, 11, 504 P.2d 548 (1972) (warrantless search for registration papers may be made when occupant is detained and refuses to identify owner of vehicle).

5.26 FORFEITURE OR LEVY

Courts differ as to whether a vehicle that was used to transport contraband may be seized without a warrant. *See* 3 Wayne R. LaFave,

Search and Seizure § 7.3(b) (4th ed. 2004); *see also Gen. Motors Leasing Corp. v. United States*, 429 U.S. 338, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977) (IRS may impound car parked on public street for levy or forfeiture purposes without obtaining warrant when no legitimate privacy is invaded; when car is on private property, a warrant may be required).

Courts in Washington, while recognizing that "searches and seizures of motor vehicles used in drug transactions are an everyday occurrence," have held that warrantless inventory searches of vehicles forfeited under drug laws are permitted under Article I, Section 7. *State v. McFadden*, 63 Wn. App. 441, 446, 820 P.2d 53, 54 (1991) *overruled on other grounds*, *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998). In *Lowery v. Nelson*, 43 Wn. App. 747, 719 P.2d 594 (1986), the court held that, under the Fourth Amendment, police are not required to obtain a search warrant before exercising the authority granted by RCW 69.50.505(1)(d) (subjecting vehicles to forfeiture when used for the delivery of controlled substances under the Uniform Controlled Substances Act) to seize a vehicle used to transport a controlled substance. *Lowery*, 43 Wn. App. at 750; *see also Rozner v. Bellevue*, 116 Wn.2d 342, 350, 804 P.2d 24, 29 (1991); *State v. Gwinner,* 59 Wn. App. 119, 123, 796 P.2d 728, 730 (1990) (upholding seizure under Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 881 (2000)). Under both the Fourth Amendment and Article I, Section 7, police may conduct a warrantless search of a vehicle seized pursuant to the forfeiture statute on the theory that the search is a valid inventory or evidentiary search. *McFadden*, 63 Wn. App. at 449; *see* 3 LaFave, *supra*, § 7.5(c), at 678–79.

5.27 IMPOUNDMENT

"Impoundment is a seizure because it involves the governmental taking of a vehicle into its exclusive custody." *State v. Coss*, 87 Wn. App. 891, 898, 943 P.2d 1126, 1129 (1997). The facts of each case determine the reasonableness of each particular impoundment. *Id.* A vehicle may be impounded without a warrant in the following circumstances:

> (1) as evidence of a crime; (2) as part of the police "community caretaking function," if the removal of the vehicle is necessary; and (3) as part of the police function of enforcing traffic regulations, if the driver has committed one of the traffic offenses for which the [l]egislature has authorized impoundment.

Id. (citing *State v. Simpson*, 95 Wn.2d 170, 189, 622 P.2d 1199, 1211 (1980)*; see also State v. Lynch*, 84 Wn. App. 467, 477–78, 929 P.2d 460, 465 (1996); *State v. Hill*, 68 Wn. App. 300, 304, 842 P.2d 996, 998

(1993); *State v. McFadden*, 63 Wn. App. 441, 448, 820 P.2d 53, 57 (1991).

A vehicle lawfully parked at one's home or even on a public street may not be impounded simply because its owner has been arrested. *United States v. Squires*, 456 F.2d 967, 969–70 (2d Cir. 1972). Similarly, impoundment is improper when the arrestee's release is imminent and the vehicle does not pose a safety hazard. *See State v. Bales*, 15 Wn. App. 834, 836, 552 P.2d 688, 690 (1976). Also, when police conduct warrantless impoundments and subsequent inventory searches, see 3 Wayne R. LaFave, *Search and Seizure* § 7.5(e) (4th ed. 2004), the searches may not be a pretext for a search that the police otherwise could not have made. *State v. White*, 83 Wn. App. 770, 774–75, 924 P.2d 55, 57 (1996), *rev'd on other grounds*, 135 Wn.2d 761, 958 P.2d 982 (1998).

5.27(a) Evidence of Crime

"A car may be lawfully impounded as evidence of a crime if an officer has probable cause to believe that it was stolen or used in the commission of a felony." *State v. Terrovona*, 105 Wn.2d 632, 647, 716 P.2d 295, 303 (1986). In *Terrovona*, the Washington Supreme Court held that police properly impounded a vehicle that they had probable cause to believe was used in the commission of a felony, where the defendant had lured the victim to the murder site by telephoning him and asking him to bring gasoline to the defendant's empty vehicle. *Id.* at 647–48; *cf. State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 698, 705 (1992) (an officer who has probable cause to believe a vehicle contains contraband or evidence of a crime may seize and hold the car for the reasonable time needed to obtain a search warrant; the car may be towed to an impound yard during seizure).

5.27(b) Community Caretaking Function

The "community caretaking function" permits impoundment when the vehicle has been abandoned, impedes traffic, poses a threat to public safety and convenience, or is itself threatened by vandalism or theft of its contents. *South Dakota v. Opperman*, 428 U.S. 364, 368–69, 96 S. Ct. 3092, 3097, 49 L. Ed. 2d 1000, 1005 (1976); *Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706, 715 (1973); *State v. Sweet*, 44 Wn. App. 226, 236, 721 P.2d 560, 566 (1986). In *Sweet*, for example, impoundment was held to be proper under the community caretaking exception when the arrestee was unconscious, items of value were visible inside the vehicle, and the vehicle was in a high-crime area. *Sweet*, 44 Wn. App. at 236–37.

Under the community caretaking exception, the police need have no reasonable belief that the vehicle is connected with criminal activity. *See State v. Chisholm*, 39 Wn. App. 864, 866–67, 696 P.2d 41, 42–43 (1985). However, police should first make an inquiry as to the availability of the owner or the owner's spouse or friends to move the vehicle. *See State v. Williams*, 102 Wn.2d 733, 743, 689 P.2d 1065, 1070–71 (1984); *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218, 1224–25 (1980); *Simpson*, 95 Wn.2d at 170. Police should also consider the alternative of parking and locking the car. *Williams*, 102 Wn.2d at 743.

5.27(c) Enforcement of Traffic Regulations

Officers are permitted to impound a vehicle as part of enforcing traffic regulations only when constitutionally reasonable and necessary to prevent a continuing violation of a traffic offense for which the legislature has specifically authorized impoundment. *See Hill*, 68 Wn. App. at 305. Impoundment is unreasonable and improper if a reasonable alternative to impoundment exists, such as when the owner of the vehicle, or a passenger in the vehicle, is available to transport it. *Id.* at 306. Police officers are to use discretion when deciding to impound a vehicle and, while an officer need not exhaust all possibilities, the officer must at least consider alternatives to impoundment. *Coss*, 87 Wn. App. at 899–900 (impoundment improper where officer failed to consider alternatives to impoundment; a validly licensed passenger could have driven vehicle from scene of traffic stop); *see also State v. Reynoso*, 41 Wn. App. 113, 119, 702 P.2d 1222, 1225–26 (1985).

Officers are not required to use their discretion in deciding whether to impound a vehicle when its driver is found to be driving with a license that has been suspended or revoked. *State v. Pulfrey*, 120 Wn. App. 270, 277, 86 P.3d 790, 794 (2004) (explaining *All Around Underground, Inc. v. Washington State Patrol,* 148 Wn.2d 145, 60 P.3d 53 (2002)), *review granted*, 152 Wn.2d 1021; 101 P.3d 108 (2004). The Washington Supreme Court in *All Around Underground* held that the Washington State Patrol exceeded its statutory authority by removing the discretion granted by the legislature to individual troopers to decide whether to order a vehicle impounded when the driver's license is suspended or revoked. 148 Wn.2d at 159–60. The court declined to reach the state and federal constitutional issues raised by the parties. *Id.* In *Pulfrey*, an officer found illegal drugs in a vehicle during a search incident to the driver's custodial arrest for driving with a suspended license in the third degree, a misdemeanor. 120 Wn. App. at 271. The officer testified that he "always" made full custodial arrests of persons suspected of driving while their licenses are suspended and "always" searched their persons and vehicles

incident to such arrests. *Id.* In this case, the officer released the vehicle to its registered owner, who showed up at the scene by the time the officer finished the search. *Id.* at 272. The court, noting that it did not decide the case on constitutional grounds, held that the officer acted lawfully because he had probable cause for the arrest. *Id.* at 281, 283–84 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001); *State v. Clausen*, 113 Wn. App. 657, 56 P.3d 587 (2002); and *State v. Thomas*, 89 Wn. App. 774, 950 P.2d 498 (1998). *But see Atwater*, 532 U.S. at 372, 121 S. Ct. at 1567, 149 L. Ed. 2d at 589 (O'Connor, J., dissenting) ("[A]s the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest."); Jason M. Katz, *Atwater v. City of Lago Vista: Buckle-Up or Get Locked-Up: Warrantless Arrests for Fine-Only Misdemeanors Under the Fourth Amendment*, 36 Akron L. Rev. 491 (2003). See *supra* § 4.8(c) for a discussion of pretextual traffic stops.

5.27(d) Warrantless Detention

Officers may make a warrantless detention of a vehicle by deflating its tires during the time when officers are in pursuit of a suspect. *State v. Burgess*, 43 Wn. App. 253, 259, 716 P.2d 948, 952 (1986). In *Burgess*, the court held that, because the detention was unaccompanied by an exploratory search, the detention was reasonably restricted in time and place and was necessary to prevent the suspect's flight from the scene. *Id.*

5.28 INVENTORY SEARCHES OF IMPOUNDED VEHICLES

When a vehicle is lawfully impounded, police are permitted to conduct a warrantlesss inventory search. *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S. Ct. 738, 741, 93 L. Ed. 2d 739, 745 (1987) (inventory searches are a well-defined exception to the warrant requirement); *State v. White*, 135 Wn.2d 761, 766–67, 958 P.2d 982, 984–85 (1998) (limiting scope of inventory search to those areas necessary to fulfill its purpose). Routine inventory searches are reasonable under the Fourth Amendment when police follow standard practices and the search is not a pretext for obtaining evidence the police would not be able to obtain otherwise. *South Dakota v. Opperman*, 428 U.S. 364, 375, 96 S. Ct. 3092, 3100, 49 L. Ed. 2d 1000, 1008 (1976); *State v. White*, 83 Wn. App. 770, 775, 924 P.2d 55, 57 (1996), *rev'd on other grounds*, 135 Wn.2d 761, 958 P.2d 982 (1998).

Washington courts have long held that a noninvestigatory inventory search of an automobile is proper when conducted in good faith for the purposes of (1) finding, listing, and securing property from loss during detention that belongs to a detained person and (2) protecting police and temporary storage bailees from liability due to dishonest claims of theft. *State v. Houser*, 95 Wn.2d 143, 154, 622 P.2d 1218, 1225 (1980); *White*, 83 Wn. App. at 77; *cf. State v. Mireles*, 73 Wn. App. 605, 612–13, 871 P.2d 162, 165–66 (1994) (routine inventory search by Department of Social and Health Services did not violate owner's Fourth Amendment rights; truck was seized to enforce lien for owner's unpaid child support; search followed written standardized inventory procedures).

The scope of an inventory search is "limited to those areas necessary to fulfill its purpose"; that is, "limited to protecting against substantial risks to property." *Houser*, 95 Wn.2d at 155. For example, police in Washington may not open and examine a locked trunk "absent a manifest necessity for conducting such a search." *Id.* at 156 (no great danger of theft to property left in trunk). Police also may not open luggage located in an impounded vehicle absent consent or exigent circumstances. *Id.* at 158. Police conducting an inventory search of a validly impounded vehicle may not search a locked trunk, despite the fact that the trunk could be opened by a switch located inside the passenger compartment. *White*, 135 Wn.2d at 765–67.

In *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984), the court suggested that police must obtain the owner's consent before conducting an inventory search of an impounded vehicle pursuant to the community caretaking exception. *Id.* at 743. However, an inventory search of a vehicle impounded pursuant to the community caretaking exception without the owner's consent was held to be valid in *State v. Sweet*, 44 Wn. App. 226, 721 P.2d 560 (1986). In *Sweet*, the owner was unconscious and unable to either give or withhold his consent; there was also no evidence suggesting that the search was conducted in bad faith or that it was a mere pretext for an investigatory search. *Id.* at 237.

5.29 WARRANTLESS SEARCHES OF VEHICLES: MEDICAL EMERGENCIES

Police may enter a vehicle to aid a person in distress or to seek information about a person in distress. *United States v. Haley*, 581 F.2d 723, 725–26 (8th Cir. 1978); 3 Wayne R. LaFave, *Search and Seizure* § 7.4(f) (4th ed. 2004). At the time of publication, no published Washington cases directly addressed warrantless searches of vehicles because of a medical emergency, though cases that have addressed the community caretaking exception to the warrant requirement have not foreclosed circumstances involving vehicles. *See supra* § 5.5.

5.30 WARRANTLESS SEARCHES IN SPECIAL ENVIRONMENTS

Warrantless searches have been permitted in special environments when the danger to the public is severe and the degree of intrusion small. Warrantless magnetometer (metal detector) searches are permitted at airports to prevent hijackings and bombings. *United States v. Skipwith*, 482 F.2d 1272, 1276 (5th Cir. 1973). Similarly, brief stops are permitted at courthouses to prevent bombings. *Downing v. Kunzig*, 454 F.2d 1230, 1233 (6th Cir. 1972).

At the same time, the Washington Supreme Court has rejected as unconstitutional the warrantless pat-down of patrons at rock concerts. *Jacobsen v. Seattle*, 98 Wn.2d 668, 673–74, 658 P.2d 653, 656 (1983). The court reasoned that there is a greater risk of danger at airports and courthouses than at rock concerts, and pat-down searches constitute a higher degree of intrusion than magnetometer and typical courthouse searches. *Id.* For a discussion of warrantless searches in other special environments, see 5 Wayne R. LaFave, *Search and Seizure* §§ 10.5 (4th ed. 2004) (borders), 10.9 (prisons and jails), 10.11 (schools).

5.31 WARRANTLESS SEARCHES AND SEIZURES OF OBJECTS IN THE PUBLIC AND PRIVATE MAILS

First-class mail and packages transported by private carriers may be seized when law enforcement officers have probable cause to believe that the mail or packages contain contraband. *See United States v. Van Leeuwen*, 397 U.S. 249, 251–52, 90 S. Ct. 1029, 1031–32, 25 L. Ed. 2d 282 (1970); *see also United States v. Jacobsen*, 466 U.S. 109, 121–22, 104 S. Ct. 1652, 1660–61, 80 L. Ed. 2d 85, 99 (1984). The contents of such mail or packages may not be examined without a warrant, however, unless the reasonable expectation of privacy in the contents no longer exists, or the examination consists of a test that will only disclose the presence of the contraband. *Jacobsen,* 466 U.S. at 121–22, 104 S. Ct. at 1660–61, 80 L. Ed. 2d at 99; *see also State v. Wolohan*, 23 Wn. App. 813, 820, 598 P.2d 421, 425 (1979). A canine sniff may be used to establish probable cause that a package lawfully held by police contains contraband. *State v. Jackson,* 82 Wn. App. 594, 606, 918 P.2d 945, 952 (1996); *see also State v. Boyce*, 44 Wn. App. 724, 729, 723 P.2d 28, 31 (1986) (declining to adopt the blanket federal rule that canine sniffs are never searches and suggesting that Article I, Section 7 requires a case-by-case examination of the circumstances in order to determine whether a canine sniff is a search).

CHAPTER 6: SPECIAL ENVIRONMENTS

6.0 SPECIAL ENVIRONMENTS AND PURPOSES: SEARCHES AND SEIZURES AT SCHOOLS, PRISONS, AND BORDERS; ADMINISTRATIVE SEARCHES AND SEIZURES

This chapter discusses the differences in reasonable expectations of privacy, burdens of proof, and warrant requirements in three special environments: public schools, detention and correction facilities, and the international border. The section also discusses special considerations in administrative searches.

For a brief discussion of warrantless searches in airports, courthouses, and public concerts, see 5 Wayne R. LaFave, *Search and Seizure* §§ 10.6, at 278, 10.7, at 313 (4th ed. 2004).

6.1 SCHOOLS

A student's legitimate expectation of privacy must be balanced against the school's legitimate need to provide an environment conducive to learning; consequently, schools are considered a special environment in search and seizure law in which the usual burdens of proof and warrant requirements are slightly relaxed. Section 6.1(a) discusses how this balance permits a school official to search a student without a warrant or even probable cause so long as a reasonable suspicion exists. Section 6.1(b) discusses how this standard has been further relaxed in the context of athletic drug-testing programs, a practice that has been upheld under the Fourth Amendment. Finally, section 6.1(c) discusses how this "reasonable suspicion" standard also applies to a search of a student's physical property.

6.1(a) Burden of Proof and Warrant Requirements

School authorities may conduct a warrantless search of a student without probable cause as long as the search is reasonable under all circumstances. *State v. B.A.S.*, 103 Wn. App. 549, 553, 13 P.3d 244, 246 (2000) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S. Ct. 733, 742, 83 L. Ed. 2d 720, 734 (1985)). A search is reasonable if: (1) it is justified at its inception and (2) it is reasonably related in scope to the circumstances that justified the interference in the first place. *Id.* Additionally, there must be a nexus between the item sought and the infraction being investigated. *Id.* at 554 (holding that no connection existed between school's closed campus policy that provided for searches of stu-

dents found violating the policy and the likelihood that a student was bringing contraband onto school property). The special problem of school discipline and the special environment of the school permit a standard of proof less than probable cause. *See T.L.O.*, 469 U.S. at 341–42, 105 S. Ct. at 743, 83 L. Ed. 2d at 734–35. This is true even when the intrusion is more substantial than a frisk and the object of the intrusion is the discovery of evidence in violation of a school rule and not the prevention of physical harm. *Id.* Thus, this reasonable suspicion standard and the balancing approach in *Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 1883, 20 L. Ed. 2d 889, 909 (1968), have been used to justify the warrantless search of a student's purse by a school official. *T.L.O.*, 469 U.S. at 329–30, 105 S. Ct. at 736, 83 L. Ed. 2d at 727.

6.1(b) Drug Testing of Student Athletes

The United States Supreme Court has more recently held that the Fourth Amendment does not require school officials to have an individualized suspicion before drug-testing student athletes. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65, 115 S. Ct. 2386, 2396, 132 L. Ed. 2d 564, 582 (1995). Additionally, requiring all students who participate in extracurricular activities to consent to urinalysis testing for drugs does not violate the Fourth Amendment. *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 838, 122 S. Ct. 2559, 2569, 153 L. Ed. 2d 735, 749 (2002).

Washington has recognized the school as a special environment and, consequently, permits a search of a student's person based on less than probable cause. *State v. McKinnon*, 88 Wn.2d 75, 81, 558 P.2d 781, 784 (1977). Using the *Terry* reasonable suspicion standard and the balancing test articulated in *Camara v. Municipal Court*, 387 U.S. 523, 535, 87 S. Ct. 1727, 1734, 18 L. Ed. 2d 930, 939 (1967), the *McKinnon* court set forth several factors for determining the reasonableness of a search: "the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." *McKinnon*, 88 Wn.2d at 81 (citations omitted). However, because *McKinnon* was decided under federal constitutional law, the continuing extent of its protection in Washington is uncertain. It has clearly been limited under federal law in the context of random, suspicionless drug testing of student athletes, a practice that has been upheld as constitutional under the Fourth Amendment. *Acton,* 515 U.S. at 664–65, 115 S. Ct. at 2396, 132 L. Ed. 2d at 582. The Washington Supreme Court has yet to rule if such searches would constitute a violation under Article I,

Section 7. However, the appellate court has shown that such testing would likely not violate the Washington Constitution. *See York v. Wahkiakum Sch. Dist. No. 200*, 110 Wn. App. 383, 386, 40 P.3d 1198, 1200 (2002) (stating that suspicionless searches are not unreasonable per se and could be upheld under a special needs analysis where there is a compelling state interest and the testing is narrowly tailored to meet that interest).

6.1(c) Searches of Student Belongings

Although the reduced standard of proof of reasonable suspicion will justify the search of a student or his or her belongings, the school still must have particularized suspicion with respect to each individual searched. *Kuehn v. Renton Sch. Dist. No. 403*, 103 Wn.2d 594, 599, 694 P.2d 1078, 1081 (1985) (en banc) (individualized suspicion required for search of school band members' luggage). *But see Acton*, 515 U.S. at 664–65, 115 S. Ct. at 2396, 132 L. Ed. 2d at 582 (individualized suspicion not required for drug testing of student athletes); *T.L.O.*, 469 U.S. at 342 n.8, 105 S. Ct. at 743 n.8, 83 L. Ed. 2d at 735 n.8 (stating that exceptions to the individualized suspicion requirement generally require a minimal privacy interest and the presence of additional "safeguards"); *Wahkiakum School District*, 110 Wn. App. at 385, 40 P.3d at 1199 (distinguishing random drug testing program for student athletes from a suspicionless search of a particular student's belongings). *See generally* 5 Wayne R. LaFave, *Search and Seizure* § 10.11(b), at 491–513 (4th ed. 2004).

6.2 Prisons, Custodial Detention, and Post-Conviction Alternatives to Prison

Incarceration affects all aspects of an individual's search and seizure protections: the reasonable expectation of privacy, the levels of proof required for intrusions, and the warrant requirements. This section will provide a sampling of some of the ways incarceration or even conviction alone alters search and seizure protections.

6.2(a) Reasonable Expectation of Privacy

A prisoner has no reasonable expectation of privacy in his or her prison cell. *Hudson v. Palmer*, 468 U.S. 517, 525–26, 104 S. Ct. 3194, 3200, 82 L. Ed. 2d 393, 402–03 (1984). Additionally, the warrantless search of the home of a convict released pending appeal does not violate constitutional protections. *State v. Lucas*, 56 Wn. App. 236, 240–41, 783

P.2d 121, 124–25 (1989) ("[O]ne released pending appeal . . . should expect close scrutiny.").

Pretrial detainees, like convicted prisoners, may be subjected to unannounced searches of living areas. *See Block v. Rutherford*, 468 U.S. 576, 589–91, 104 S. Ct. 3227, 3234–35, 82 L. Ed. 2d 438, 449–50 (1984) (unannounced searches of living areas held not violative of due process or Fourth Amendment rights); *Bell v. Wolfish*, 441 U.S. 520, 555–57, 99 S. Ct. 1861, 1882–84, 60 L. Ed. 2d 447, 479–80 (1979) ("It is difficult to see how the detainee's interest in privacy is infringed by the room-search rule."). Additionally, jailed suspects have no expectation of privacy in property located in the property room at the prison under both the Fourth Amendment and Article I, Section 7 of the Washington Constitution. *State v. Cheatam*, 112 Wn. App. 778, 785–87, 51 P.3d 138, 142–43 (2002), *aff'd*, 150 Wn.2d 626, 81 P.3d 830 (2003).

A convicted sex offender has only a minimal expectation of privacy in personal body fluids; thus, the State may remove blood for testing without the defendant's consent. *In re Juveniles A, B, C, D, E*, 121 Wn.2d 80, 92–93, 96, 847 P.2d 455, 460, 462 (1993) (upholding constitutionality of RCW 70.24.340, which mandates HIV testing for adults and juveniles who have been convicted of a sexual offense under RCW 9A.44). Additionally, under RCW 43.43.754, the state may obtain blood samples and perform DNA tests without the defendant's consent following conviction. *State v. Olivas*, 122 Wn.2d 73, 98, 856 P.2d 1076, 1089 (1993) (en banc) (constitutionality upheld under Fourth Amendment).

6.2(b) Levels of Proof

Neither probable cause nor individualized suspicion is required for searches of prisoners, pretrial detainees, or prison cells. *See Bell*, 441 U.S. at 555–60, 99 S. Ct. at 1882–85, 60 L. Ed. 2d at 479–82 (pretrial detainees); *State v. Baker*, 28 Wn. App. 423, 424–25, 623 P.2d 1172, 1173 (1981) (prisoners).

Furthermore, a parolee does not have the same search and seizure protections as an ordinary citizen, and thus police may search a parolee's vehicle based only on a "well-founded" suspicion of criminal activity. *State v. Coahran*, 27 Wn. App. 664, 666, 620 P.2d 116, 118 (1980). Lastly, convicts released pending appeal are also subject to a warrantless search if the police have a "well-founded" suspicion of a violation of release conditions. *Lucas*, 56 Wn. App. at 243–44, 783 P.2d at 126.

6.2(c) Warrantless Searches and Seizures

Warrants are not required for searches of prisoners or pretrial detainees. *See Block*, 468 U.S. at 591, 104 S. Ct. at 3234–35, 82 L. Ed. 2d

at 449–50; *Hudson*, 468 U.S. at 526, 104 S. Ct. at 3200, 82 L. Ed. 2d at 402–03.

Warrants also are not required for searches of parolees, probationers, work release inmates, and convicts released pending appeal, or for any of these groups' homes and effects. *See generally United States v. Knights*, 534 U.S. 112, 122 S. Ct. 587, 151 L. Ed. 2d 497 (2001) (discussing whether a parole condition permitting the search of the "person, property, place of residence, vehicle, [and] personal effects . . . with or without a search warrant" satisfies the Fourth Amendment); *see also Lucas*, 56 Wn. App. at 243–44; *Griffin v. Wisconsin*, 483 U.S. 868, 875–77, 107 S. Ct. 3164, 3169–70, 97 L. Ed. 2d 709, 718–19 (1987) (neither probable cause nor warrant required for search of probationer's home); *State v. Campbell*, 103 Wn.2d 1, 22–23, 691 P.2d 929, 941–42 (1984) (en banc); *Coahran*, 27 Wn. App. at 666–67, 620 P.2d at 118; *State v. Simms*, 10 Wn. App. 75, 85–86, 516 P.2d 1088, 1094–95 (1973). Persons residing with prisoners who are released to a home-detention program are required to sign consent forms that allow for warrantless searches and seizures of the property where the person and the prisoner reside. *State v. Cole*, 122 Wn. App. 319, 93 P.3d 209 (2004).

6.2(d) Strip and Body Cavity Searches Following Custodial Arrest for Minor Offenses

In Washington, routine strip searches are governed by statute and administrative regulation. *See* RCW 10.79.060–170; WAC §§ 289-02-020, -100, -200. A defendant's state protections from a strip search under Article I, Section 7 are coextensive with the defendant's Fourth Amendment rights. *State v. Audley*, 77 Wn. App. 897, 904, 908, 894 P.2d 1359, 1363, 1365 (1995) (holding that RCW 10.79.130(1)(a) is constitutional under Article I, Section 7 and the Fourth Amendment and that such searches are permissible where they are supported by reasonable suspicion that an arrestee is concealing contraband that poses a threat to jail security). Only a reasonable suspicion is required to conduct a "dry cell search" of prisoner. *State v. Rainford*, 86 Wn. App. 431, 433, 435 n.1, 936 P.2d 1210, 1211, 1212 n.1 (1997) ("dry cell search" typically involves placing prisoner in private room under 24-hour observation until prisoner has undergone three bowel movements and then examining the feces for signs of drug use). For strip and body cavity searches conducted prior to a detainee's first court appearance, probable cause and a warrant are required unless one of the following occurs: (1) the detainee is charged with a violent offense; (2) the detainee is charged with an offense involving escape, burglary, use of a deadly weapon, or contraband; or (3) police possess a reasonable suspicion that the detainee is conceal-

ing on his or her person contraband, weapons, or fruits or instrumentalities of crime. WAC §§ 289-16-100 to -200; *cf. State v. Brown*, 33 Wn. App. 843, 848, 658 P.2d 44, 47–48 (1983) (reasonable suspicion for strip search of prisoner found after prisoner had personal contact with visitor); *State v. Hartzog*, 96 Wn.2d 383, 396–97, 635 P.2d 694, 701–02 (1981) (holding that visual and body cavity searches of prisoners leaving penal institution for court appearance are permissible, and holding that where the record fails to disclose that an inmate-defendant has undergone a body cavity probe search immediately before leaving the penitentiary, a second search at courthouse may also be imposed without a hearing to determine its necessity).

6.3 INTERNATIONAL BORDERS

Searches and seizures of travelers at or near the international border fall within the scope of the Fourth Amendment, but such intrusions generally do not have to meet the strict levels of proof and warrant requirements of ordinary searches and seizures. This section will briefly describe some of the situations in which traditional proof and warrant requirements have been relaxed.

6.3(a) Permanent Checkpoints: Illegal Aliens

Provided the intrusion does not exceed the scope of a *Terry* stop, law enforcement officers may conduct routine brief questioning of travelers at permanent checkpoints to identify illegal aliens. *United States v. Martinez-Fuerte*, 428 U.S. 543, 566–67, 96 S. Ct. 3074, 3087, 49 L. Ed. 2d 1116, 1133 (1976). No warrant is required for such stops. *See id.* In Washington, race or color alone is not a sufficient basis for making an investigatory stop at a border patrol. *See State v. Almanza-Guzman*, 94 Wn. App. 563, 567, 972 P.2d 468, 470 (1999).

6.3(b) Roving Patrols: Illegal Aliens

To stop the vehicle, officers conducting roving patrols near borders must have a reasonable suspicion, based on "specific articulable facts," that a vehicle contains illegal aliens. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884, 95 S. Ct. 2574, 2582, 45 L. Ed. 2d 607, 618 (1975).

For a roving patrol to search a vehicle, reasonable suspicion that the vehicle contains illegal aliens is insufficient; the officers must have probable cause. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269–70, 93 S. Ct. 2535, 2537–38, 37 L. Ed. 2d 596, 600–01 (1973).

6.3(c) Smuggling

The scope of a *Terry* stop at the border may be relatively intrusive when smuggling of narcotics is suspected. *See United States v. Montoya de Hernandez*, 473 U.S. 531, 544, 105 S. Ct. 3304, 3312, 87 L. Ed. 2d 381, 393 (1985) (individual fitting courier profile of alimentary canal smuggler may be detained for 16 hours pending bowel movement); *cf. Florida v. Royer*, 460 U.S. 491, 502–03, 103 S. Ct. 1319, 1326–27, 75 L. Ed. 2d 229, 239–40 (1983) (officers who had only reasonable suspicion that airport traveler was smuggling narcotics could not detain traveler in a special room and seize his tickets and luggage); *United States v. Place*, 462 U.S. 696, 709–10, 103 S. Ct. 2637, 2645–46, 77 L. Ed. 2d 110, 122–23 (1983) (90-minute detention of luggage at international airport unreasonable when law enforcement officers had only reasonable suspicion of smuggling). *But see United States v. Sharpe*, 470 U.S. 675, 687–88, 105 S. Ct. 1568, 1576, 84 L. Ed. 2d 605, 616–17 (1985) (20-minute detention of suspect based only on reasonable suspicion is permissible; *Terry* stop unconstitutional in duration only when police do not act with due diligence, not at expiration of any time period). However, a Washington court has held that absent some independent legal justification, customs officers may not conduct warrantless searches based on less than probable cause at locations other than an actual border. *See State v. Quick*, 59 Wn. App. 228, 232, 796 P.2d 764, 766 (1990).

6.4 ADMINISTRATIVE SEARCHES

Searches conducted for administrative purposes, whether or not criminal prosecution is anticipated, are governed by the Fourth Amendment. *See, e.g., Michigan v. Clifford*, 464 U.S. 287, 291–93, 104 S. Ct. 641, 646–47, 78 L. Ed. 2d 477, 483–84 (1984) (Fourth Amendment applies to inspection of home that was partially damaged by fire, even when purpose of inspection is to determine fire's origin and no criminal conduct is suspected).

6.4(a) Reasonable Expectation of Privacy

An individual's reasonable expectation of privacy is not affected by the fact that a search is part of an administrative or regulatory program or has a purpose other than criminal prosecution. *See Camara v. Municipal Court*, 387 U.S. 523, 532–33, 87 S. Ct. 1727, 1732–33, 18 L. Ed. 2d 930, 937–38 (1967) (search of home for housing code violations); *See v. Seattle*, 387 U.S. 541, 545–46, 87 S. Ct. 1737, 1740–41, 18 L. Ed. 2d 943, 947–48 (1967) (search of commercial premises for fire code violations). Although there are a few pervasively regulated industries that are not

permitted reasonable expectations of privacy, the general rule is that the Fourth Amendment protections apply to civil as well as criminal searches and to commercial as well as residential premises. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S. Ct. 1816, 1820–21, 56 L. Ed. 2d 305, 311–12 (1978) (except for particular industries, such as those involving liquor and firearms where no reasonable expectation of privacy exists, the Fourth Amendment protects against unreasonable administrative searches of commercial premises); *see also Clifford*, 464 U.S. at 291, 104 S. Ct. at 646, 78 L. Ed. 2d at 483; *Michigan v. Tyler*, 436 U.S. 499, 506, 98 S. Ct. 1942, 1948, 56 L. Ed. 2d 486, 496 (1978). In addition, some regulated industries are granted only a limited expectation of privacy which must be balanced against the need for a particular administrative search. *See Murphy v. State*, 115 Wn. App. 297, 313, 62 P.3d 533, 541 (2003) (holding a patient has a limited expectation of privacy in prescription records that is outweighed by the government's statutorily mandated interest in monitoring the flow of drugs from pharmacies to patients).

6.4(b) Warrant Requirements

Warrants generally are required for administrative searches of both private and commercial premises. *See Camara*, 387 U.S. at 532–33, 87 S. Ct. at 1732–33, 18 L. Ed. 2d at 937–38. When the traditional exceptions to the warrant requirement apply, however, a warrant is unnecessary. *See Clifford*, 464 U.S. at 294–95, 104 S. Ct. at 646–47, 78 L. Ed. 2d at 483–84 (warrant not required for entry onto premises when consent given or exigent circumstances present: "[E]vidence of criminal activity . . . discovered during the course of a valid administrative search . . . may be seized under the 'plain view' doctrine.") (citation omitted).

Warrants are not required in certain limited situations when the searches are made pursuant to comprehensive and predictable legislative schemes. *See Donovan v. Dewey*, 452 U.S. 594, 598–99, 101 S. Ct. 2534, 2537–38, 69 L. Ed. 2d 262, 268–69 (1981). Such situations are characterized by a substantial federal interest in inspection, as in the case of hazardous industries, and by the necessity of a warrantless inspection to enforce the legislative purpose. *See id.* at 598–99, 101 S. Ct. at 2538–39, 69 L. Ed. 2d at 269 (congressional scheme authorizing warrantless inspections of mines found constitutional); *see also Murphy*, 115 Wn. App. at 307–08, 62 P.3d at 538 (state statute requiring pharmacies to keep records of dispensed prescriptions and to make them available for inspection by state pharmacy board or other law enforcement officer does not violate search and seizure provisions of either state or federal constitutions). In addition, the scheme must prove to be an adequate substitute

for a warrant by imposing certainty and regularity in the inspections and by accommodating special privacy concerns. *Donovan,* 42 U.S. at 603, 101 S. Ct. at 2539–40, 69 L. Ed. 2d at 271–72.

Next, warrants are not always required for license, registration, and equipment spot checks of vehicles. *Compare Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673–74 (1979) (warrant required for random spot check of vehicles), *with Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455, 110 S. Ct. 2481, 2488, 110 L. Ed. 2d 412, 423 (1990) (holding that a highway sobriety checkpoint program, under which all motorists passing through the checkpoint were stopped and examined for signs of intoxication, did not violate the Fourth Amendment), *and State v. Marchand*, 104 Wn.2d 434, 441, 706 P.2d 225, 228 (1985) (en banc) (holding unconstitutional a statute empowering state patrol officers to require the driver of any motor vehicle being operated on any Washington highway to stop and display his or her driver's license and/or to submit the vehicle to an inspection to ascertain whether it complied with the minimum equipment requirements).

6.4(c) Level of Proof Requirements

To obtain an administrative warrant to search commercial or residential premises, law enforcement officers must either offer specific proof of a violation, or show that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]." *Marshall*, 436 U.S. at 320–21, 98 S. Ct. at 1824, 56 L. Ed. 2d at 316 (brackets in original) (citation omitted) (quoting *Camara*, 387 U.S. at 538, 87 S. Ct. at 1736, 18 L. Ed. 2d at 941).

When officers seek a warrant based on a general administrative program, they must set forth sufficient details of the program to enable the magistrate to determine whether the program is reasonable. *Seattle v. Leach*, 29 Wn. App. 81, 85, 627 P.2d 159, 162 (1981). Conclusory statements are inadequate. *Id.*

When an administrative warrant is sought to determine the recent cause of a fire, "fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victims' privacy, and that the search will be executed at a reasonable and convenient time." *Clifford*, 464 U.S. at 294, 104 S. Ct. at 647, 78 L. Ed. 2d at 484.

The following two factors affect the constitutionality of vehicle spot checks: (1) whether the purpose is satisfied by the procedure—that is, whether spot checks are "a sufficiently productive mechanism to jus-

tify the intrusion" or (2) whether the checks involve the "unconstrained exercise of discretion" by officers conducting the stops. *Prouse*, 440 U.S. at 658–59, 663, 99 S. Ct. at 1399, 1401, 59 L. Ed. 2d at 670–71, 673–74 (officer's unconstrained and random discretionary stop of vehicle unjustified by incremental contribution to highway safety); *see also Marchand*, 104 Wn.2d at 439, 706 P.2d at 227 (officer's unconstrained discretion not justified where efficacy of procedure not shown by record). However, where the officers have limited discretion, there is no constitutional violation. *See, e.g., Sitz*, 496 U.S. at 451–52, 110 S. Ct. at 2486, 110 L. Ed. 2d at 420–21 (holding that a highway sobriety checkpoint program, under which *all* motorists passing through the checkpoint were stopped and examined for signs of intoxication, did not violate the Fourth Amendment).

Since the *Sitz* case, the validity of Washington case law on the issue of vehicle checkpoints prior to that decision has been imperiled. *Compare Seattle v. Yeager*, 67 Wn. App. 41, 47, 834 P.2d 73, 76 (1992) (upholding constitutionality of statute authorizing stops of vehicles with license plates marked to indicate that the driver had previously been cited for driving without a license; no particularized suspicion required), *with Seattle v. Mesiani*, 110 Wn.2d 454, 460, 755 P.2d 775, 778 (1988) (en banc) (sobriety checkpoint program established during holiday season that involved the warrantless stopping of all oncoming motorists at checkpoints violated state and federal constitutional guarantees against seizure without authority of law), *and Marchand*, 104 Wn.2d at 441. Although the Washington Supreme Court's interpretation of the Fourth Amendment in *Mesiani* has been overruled by the United States Supreme Court's holding in *Sitz*, the state constitutional grounds of *Mesiani* have not been expressly overruled.

As with the "area" warrants that authorize housing and fire code inspections, see *Camara*, 387 U.S. at 537–38, 87 S. Ct. at 1735–36, 18 L. Ed. 2d at 940–41; *See*, 387 U.S. at 545, 87 S. Ct. at 1740, 18 L. Ed. 2d at 947–48, individualized suspicion is not necessarily required for spot checks. *See Sitz*, 496 U.S. at 451–52, 110 S. Ct. at 2486, 110 L. Ed. 2d at 421; *see also Prouse*, 440 U.S. at 654–55, 99 S. Ct. at 1396–97, 59 L. Ed. 2d at 668 ("In those situations where the balance of interests preclude insistence upon some quantum of individualized suspicion, other safeguards are generally relied upon.") (citations omitted). Furthermore, it is clear that under certain circumstances and with certain procedures the Washington Constitution allows vehicle spot checks. *Compare Marchand*, 104 Wn.2d at 435 (procedure unconstitutional where random vehicles are stopped for inspection while others were allowed to pass), *with*

Yeager, 67 Wn. App. at 48 (procedure constitutional where the stops are limited to vehicles with marked license plates).

CHAPTER 7:
ADMINISTRATION OF THE EXCLUSIONARY RULE

7.0 INTRODUCTION

If a search or seizure violates a person's Fourth Amendment rights, the exclusionary rule has traditionally provided that any evidence found as a result of the search or seizure must be suppressed in the defendant's criminal trial. *State v. Duncan*, 146 Wn.2d 166, 176, 43 P.3d 513, 518 (2002) (en banc); *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668, 680 (2000) (en banc). When physical evidence must be suppressed, testimony regarding that physical evidence must also be suppressed if such testimony is the fruit of the unlawful search or seizure. 6 Wayne R. LaFave, *Search and Seizure* § 11.6(a), at 396 (4th ed. 2004); *see, e.g.*, *State v. Faford*, 128 Wn.2d 476, 488, 910 P.2d 447, 453 (1996) (en banc); *State v. Salinas*, 121 Wn.2d 689, 697, 853 P.2d 439, 442–43 (1993) (en banc). To invoke the exclusionary rule, a defendant must make a timely objection, *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813, 820 (1982), *rev'd in part on other grounds by State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1983) (en banc), and have standing to object. *See State v. Jones*, 146 Wn.2d 328, 331–35, 45 P.3d 1062, 1064–65 (2002) (en banc) (explaining that although automatic standing has been abandoned in the United States Supreme Court, it still maintains a presence in Washington and that a person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him); *State v. Williams*, 142 Wn.2d 17, 21–23, 11 P.3d 714, 716–18 (2000) (en banc); *State v. Michaels*, 60 Wn.2d 638, 640–41, 374 P.2d 989, 990 (1962) (en banc). The rule applies both to federal and state violations of the Fourth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 660, 81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1093 (1961).

Historically, the exclusionary rule has had the following purposes: (1) to deter unreasonable searches and seizures, *id.* at 656, 81 S. Ct. at 1692, 6 L. Ed. 2d at 1090–91; (2) to preserve judicial integrity by preventing courts from becoming accomplices to the willful disobedience of the Constitution, *id.* at 659, 81 S. Ct. at 1694, 6 L. Ed. 2d at 1092; and (3) to sustain the public's belief that the government will not profit from lawless behavior, *United States v. Calandra*, 414 U.S. 338, 357, 94 S. Ct. 613, 624, 38 L. Ed. 2d 561, 576–77 (1974) (Brennan, J., dissenting). In 1984, the United States Supreme Court identified deterrence of police misconduct as the principal justification for the exclusionary rule. *United States v. Leon*, 468 U.S. 897, 916, 104 S. Ct. 3405, 3417, 82 L. Ed. 2d 677, 696 (1984). In fact, the Court declined to employ the rule to demon-

strate judicial integrity or to deter magistrates from improper probable cause determinations. *Id.* at 917, 104 S. Ct. at 3417–18, 82 L. Ed. 2d at 695.

Although most of the discussion in this section centers upon the exclusion of evidence when compelled by the federal constitution, state law can compel the exclusion of evidence from state courts that federal law would hold admissible in federal courts. *See, e.g.*, *State v. Williams*, 94 Wn.2d 531, 541, 617 P.2d 1012, 1018 (1980) (en banc) (recordings made in violation of Washington privacy statute, although permitted under federal wiretap statute, are inadmissible in state court proceedings); *see* 1 LaFave, *supra*, § 1.5(b), at 159–61 (state may compel exclusion of illegally seized evidence even when the federal constitution does not require such exclusion).

The variations between the federal and state exclusionary rules are largely based on the difference in wording and intent between the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington Constitution. *See, e.g.*, *Duncan*, 146 Wn.2d at 176–77 (explaining that the primary objectives underlying the exclusionary rule are first, and most importantly, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means); *State v. Rife*, 133 Wn.2d 140, 148, 943 P.2d 266, 269 (1997) (en banc); *State v. Crawley*, 61 Wn. App. 29, 34, 808 P.2d 773, 776 (1991); *State v. White*, 97 Wn.2d 92, 110–12, 640 P.2d 1061, 1071–72 (1982) (en banc). Under the Fourth Amendment, the application of the rule will depend largely on whether the exclusion of evidence will deter future police misconduct; but, under Article I, Section 7, the application of the rule focuses on protecting individual rights and may even be automatic. *Compare Crawley*, 61 Wn. App. at 35, *and White*, 97 Wn.2d at 109–12, *with Leon*, 468 U.S. at 918, 104 S. Ct. at 3418, 82 L. Ed. 2d at 695. Washington has even recognized deterrence of legislative misconduct as a legitimate purpose for excluding illegally obtained evidence. *White*, 97 Wn.2d at 112.

7.1 CRITICISM OF THE RULE

A number of judges and legal scholars have opposed a broad-reaching exclusionary rule. *See Stone v. Powell*, 428 U.S. 465, 484 n.21, 96 S. Ct. 3037, 3047–48 n.21, 49 L. Ed. 2d 1067, 1082 n.21 (1976). *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 1.2(a)–(f), at 26–54 (4th ed. 2004). The arguments for and counterarguments against a broader rule include the following:

(1) Argument: The rule handcuffs the police by handicapping the detection and prosecution of crime. *Id.* § 1.2(a), at 27.

Counterargument: The Fourth Amendment itself, not the rule, has that effect. *Id.* That very argument was rejected when the amendment was adopted. *See id.* For citations to studies on the effects of the exclusionary rule on felony prosecutions, see *United States v. Leon*, 468 U.S. 897, 907–08 n.6, 104 S. Ct. 3405, 3413 n.6, 82 L. Ed. 2d 677, 688 n.6 (1984). For the suggestion that illegally issued warrants cause the loss of only a negligible portion of felony arrests, see 1 LaFave, *supra,* § 1.3(c), at 61.

(2) Argument: The rule aids only the guilty. *Id.* § 1.2(a), at 29.

Counterargument: Because of the rule's deterrent effect, innocent persons are spared unreasonable searches and seizures. *Id.* at 30.

(3) Argument: The rule does not deter. *Id.* § 1.2(b), at 32.

Counterargument: After the rule's creation, there was a dramatic increase in the number of warrant applications and the number of police academy classes offering instruction on obtaining evidence in a manner that does not violate the Fourth Amendment. *Stone*, 428 U.S. at 492, 96 S. Ct. at 3051, 49 L. Ed. 2d at 1086–87.

Suggested alternatives to the exclusionary rule include: providing civil damages as the sole remedy, limiting the rule to knowing violations, or limiting the rule to minor crimes. *See generally* 1 LaFave, *supra,* § 1.2(a)–(f), at 26–54. *See also* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363 (1999) (suggesting an administrative damages regime wherein Fourth Amendment violations could be brought directly against police); L. Timothy Perrin, *If It's Broken Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669 (1998) (providing an empirical study of the exclusionary rule and suggesting a civil administrative remedy to partially replace the rule); Stephen E. Gottlieb, *Feedback from the Fourth Amendment: Is the Exclusionary Rule an Albatross Around the Judicial Neck?*, 67 Ky. L.J. 1007 (1979) (suggesting remedy solely in tort, with damages paid either through insurance or governmental reimbursement).

7.2 Limitations in the Application of the Rule

This section will discuss two general categories of exceptions to the exclusionary rule: (1) those based on the good faith of the police, and (2) those based on the non-substantive use of the illegally obtained evidence. Subsequent sections will discuss additional limitations on the application of the rule that pertain to the following: (1) the type of judicial proceeding, *see* 1 Wayne R. LaFave, *Search and Seizure* § 1.7(a)–(h), at 218–55 (4th ed. 2004); (2) the public or private status of the party conducting the

unlawful search and seizure, *see id.* § 1.8(a)–(h), at 255–333; (3) the nexus between the unlawful search or seizure and the evidence sought to be suppressed, *see id.* § 1.6(a), at 187 n.4; and (4) the procedural requirements, *see* 2 *id.*, § 4.4(d), at 553–62.

7.2(a) Unlawful Searches and Seizures Conducted in Good Faith

The exclusionary rule does not apply in federal courts when evidence is seized in reasonable, good faith reliance on a search warrant that is later found to be unsupported by probable cause. *See United States v. Leon*, 468 U.S. 897, 919–21, 104 S. Ct. 3405, 3419, 82 L. Ed. 2d 677, 696–97 (1984). "The marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.* at 922, 104 S. Ct. at 3420, 82 L. Ed. 2d at 698. Yet, Washington courts have repeatedly refused to adopt the *Leon* good faith exception to search warrants, holding that such an exception violates the state constitution. *See State v. Walker*, 101 Wn. App. 1, 11–12, 999 P.2d 1296, 1301–02 (2000) (with respect to a warrant improperly issued by a court clerk, the court stated that to date, the Washington Supreme Court has remedied all violations of Article I, Section 7 by applying the exclusionary rule, and that it has declined even to consider limitations parallel to the federal ones); *State v. Crawley*, 61 Wn. App. 29, 35, 808 P.2d 773, 776 (1991) (recognizing that Washington has not adopted a "good faith" exception, thereby allowing admission of evidence obtained using invalid search warrant); *State v. Huft*, 106 Wn.2d 206, 212, 720 P.2d 838, 844 (1986) (en banc) (declining to adopt "good faith" exception due to a lack of the substantial basis that is required for probable cause).

Similarly, in federal courts, evidence seized under the authority of a technically invalid warrant may be admitted when the police reasonably believed that the search they conducted was authorized by a valid warrant. *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88, 104 S. Ct. 3424, 3427–28, 82 L. Ed. 2d 737, 743 (1984). "Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurances that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve." *Id.* at 990–91, 104 S. Ct. at 3429, 82 L. Ed. 2d at 745.

Federal courts may also admit evidence obtained during a search incident to an unlawful arrest when the arrest is made in good faith reliance on an ordinance subsequently declared unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 40, 99 S. Ct. 2627, 2633, 61 L. Ed. 2d 343, 351 (1979). This good faith exception has its own exception: The evidence is inadmissible when the ordinance at issue is so similar to another

ordinance or statute, which has been previously declared unconstitutional, that it is "so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws." *Id.* at 38, 99 S. Ct. at 2632, 61 L. Ed. 2d at 350. Even if the unlawful arrest was based partly on a provision of a statute that was presumptively valid at the time of the arrest because it had not yet been construed, evidence obtained is inadmissible if the valid section of the statute could not be enforced without incorporating the grossly and "flagrantly unconstitutional" section. *State v. White*, 97 Wn.2d 92, 104, 640 P.2d 1061, 1068 (1982) (en banc).

However, the *DeFillippo* good faith exception to the exclusionary rule is inapplicable to claims brought under Article I, Section 7 of the Washington Constitution. *White*, 97 Wn.2d at 109–12; *State v. Wallin*, ___ Wn. App. ___, ___, 105 P.3d 1037, 1044–45 (2005). Thus, when an arrest is made pursuant to an unlawful statute, the good faith of police and the presumptive validity of the statute at the time of arrest will not render the fruits of the arrest admissible. *White,* 97 Wn.2d at 112 (recognizing that the automatic application of the exclusionary rule "will add stability to the rights of individual citizens, discourage the legislature from passing provisions akin to [the unlawful statute], and will make law enforcement more predictable").

Recently, Washington's good faith exception has been called into question. In *Wallin*, a court extended the community placement period for a defendant who, following a child molestation conviction, violated his community placement terms. *Wallin*, 105 P.3d at 1038–39. During the extended placement period, Department of Corrections officers and police searched the defendant's apartment in good faith after a neighbor reported that he was taking pictures of her teenage nieces from his apartment window. *Id.* During the searches, officers found information, including thousands of images portraying minors in sexually suggestive poses or activities and homemade photos. *Id.* Although this information was used to convict the defendant of various charges, including child rape, the appellate court found that the evidence was inadmissible because it stemmed from the order extending his community supervision, which was invalid. *Id.* at 1043–44. As part of its opinion, the court discussed Washington's rejection of the good faith exception and stated "that the facts of [the] case illustrate a need for a [good faith] exception," but that "it is for the supreme court to decide whether it should reexamine the exclusionary rule in light of the facts of this case." *Id.* at 1044–45.

7.2(b) Nonsubstantive Use of Illegally Seized Evidence

Illegally obtained evidence may be used to impeach a defendant's direct testimony at trial even when the evidence is inadmissible in the government's case-in-chief. *Walder v. United States*, 347 U.S. 62, 64–65, 74 S. Ct. 354, 355–56, 98 L. Ed. 503, 506–07 (1954). A defendant's statements made in response to proper cross-examination are also subject to impeachment by illegally obtained evidence that is inadmissible as substantive evidence of guilt. *United States v. Havens*, 446 U.S. 620, 627–28, 100 S. Ct. 1912, 1917, 64 L. Ed. 2d 559, 566 (1980); *State v. Simpson*, 95 Wn.2d 170, 179–80, 622 P.2d 1199, 1206 (1980) (en banc).

7.3 Applications of the Exclusionary Rule in Criminal Proceedings Other Than Trials

7.3(a) Grand Jury Testimony

A person testifying before a grand jury may not refuse to answer questions on the ground that the questions are based on evidence derived from an illegal search. *United States v. Calandra*, 414 U.S. 338, 349–50, 94 S. Ct. 613, 620–21, 38 L. Ed. 2d 561, 572 (1974). The exclusionary rule is not applied to grand jury proceedings because its application would have only a marginal deterrent effect. *Id.* at 351–52, 94 S. Ct. at 622, 38 L. Ed. 2d at 573. In determining whether to employ the rule, the court weighs the deterrent value of applying the rule against the costs of excluding the type of evidence in question. *Id.* at 349, 94 S. Ct. at 620–21, 38 L. Ed. 2d at 572.

7.3(b) Indictment

The rule does not apply to indictments based on illegally obtained evidence. *Lawn v. United States*, 355 U.S. 339, 350, 78 S. Ct. 311, 318, 2 L. Ed. 2d 321, 330 (1958). Again, excluding the evidence, even if it means dismissing an indictment, would have only marginal deterrent value. *Calandra*, 414 U.S. at 351–52, 94 S. Ct. at 622, 38 L. Ed. 2d at 573.

7.3(c) Probable Cause Hearing

Illegally seized evidence may be considered in determining whether there is probable cause to believe that the accused committed the crime charged. *Giordenello v. United States*, 357 U.S. 480, 488, 78 S. Ct. 1245, 1251, 2 L. Ed. 2d 1503, 1511 (1958) (holding that it would not be sound judicial administration to send the case back to the district court for a special hearing regarding probable cause, because illegally seized evi-

dence was introduced at trial); *State v. O'Neill*, 103 Wn.2d 853, 867–72, 700 P.2d 711, 719–21 (1985) (en banc) (recordings by federal agents made in a manner inconsistent with state law and thus inadmissible at trial, nevertheless may be used to furnish probable cause for court-ordered search).

7.3(d) Bail Hearing

Several cases in other jurisdictions suggest that illegally seized evidence may be suppressed at bail hearings. *See Steigler v. Super. Ct.*, 252 A.2d 300, 305 (Del. 1969) (conclusion of Superior Court was not invalidated by consideration of evidence later found to be inadmissible); *State v. Tucker*, 101 N.J. Super. 380, 383, 244 A.2d 353, 355 (1968) (no need to go into detail when considering the evidence for purposes of a bail application). This question has not been presented to the Washington Supreme Court.

7.3(e) Sentencing

Before the establishment of the Sentencing Reform Act of 1984, the exclusionary rule had only been applied in sentencing hearings when the illegal search was conducted for the express purpose of enhancing the sentence or improperly influencing the sentencing judge. *United States v. Larios*, 640 F.2d 938, 941–42 (9th Cir. 1981) (remanding case for resentencing because judge abused his discretion by excluding evidence, when the search was illegally based on a technical error, not because of an overextensive or inappropriate search); *United States v. Vandemark*, 522 F.2d 1019, 1022 (9th Cir. 1975) (limiting exclusion of evidence when customs agent was not aware that defendant was a probationer or that evidence could be used for any other purpose than the possession conviction); *Verdugo v. United States*, 402 F.2d 599, 613 (9th Cir. 1968) (excluding evidence from sentencing consideration when search conducted without a warrant was "blatantly illegal" and the police needed to be deterred). *But see United States v. Graves*, 785 F.2d 870, 873 (10th Cir. 1986) (extending exclusionary rule to sentencing hearing would have "deterrent effect so minimal as to be insignificant"); *United States v. Butler*, 680 F.2d 1055, 1056 (5th Cir. 1982) (deterrent effect minimal where conviction obtained "without the evidence suppressed"); *United States v. Lee*, 540 F.2d 1205, 1211 (4th Cir. 1976) (applying the exclusionary rule to sentencing hearing would have minimal deterrent effect); *United States v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970) (applying exclusionary rule to sentencing hearing after it had been applied at trial "would not add in any significant way to the deterrent effect of the rule"). *See generally* Michael K. Forde, *The Exclusionary Rule at Sentencing: New Life*

Under the Federal Sentencing Guidelines, 33 Am. Crim. L. Rev. 379 (1996).

Since the promulgation of the Sentencing Guidelines, the majority of jurisdictions have maintained that the exclusionary rule does not apply in sentencing hearings. *See United States v. Kim*, 25 F.3d 1426, 1432–36 (9th Cir. 1994); *United States v. Montoya-Ortiz*, 7 F.3d 1171, 1181–82 (5th Cir. 1993); *United States v. Jenkins*, 4 F.3d 1338, 1344–45 (6th Cir. 1993); *United States v. Tejada*, 956 F.2d 1256, 1260–61 (2d Cir. 1992); *United States v. Lynch*, 934 F.2d 1226, 1234 (11th Cir. 1991); *United States v. Torres*, 926 F.2d 321, 324–25 (3d Cir. 1991); *United States v. McCrory*, 930 F.2d 63, 68–69 (D.C. Cir. 1991). In fact, the Ninth Circuit has suggested that the Sentencing Guidelines and Title 18, Section 3661 of the United States Code may preclude the application of the *Verdugo* exception to the rule against application of the exclusionary rule to sentencing hearings, and may require that all evidence be considered during sentencing. *Kim*, 25 F.3d at 1435–36; *see also* Forde, *supra*, at 388–92.

A small minority of jurisdictions have argued that the exclusionary rule should apply at sentencing given the certainty of increased punishment if illegally seized evidence is considered under the Sentencing Guidelines. *See United States v. Jewel*, 947 F.2d 224, 238–40 (7th Cir. 1991) (Easterbrook, J., concurring); *United States v. Gilmer*, 811 F. Supp. 578, 579 (D. Colo. 1993); *United States v. Rullo*, 748 F. Supp. 36, 43–45 (D. Mass. 1990) (exclusionary rule should apply because inadmissible evidence is not permitted under the inevitable discovery rule); *see also* Forde, *supra,* at 392–401. Failure to invoke the exclusionary rule during the expansive sentencing process would create a greater incentive for police officers to illegally search for additional evidence in order to enhance sentencing such that the "constitutional ban on unreasonable searches and seizures will become a parchment barrier." *Jewel*, 947 F.2d at 240 (Easterbrook, J., concurring); *see also* Forde, *supra,* at 408–09.

Washington's Sentencing Reform Act of 1981, which became effective July 1, 1984, structured, but did not eliminate, discretionary decisions affecting sentencing. RCW 9.94A.010. Because the sentencing process is limited to the present conviction and the defendant's prior convictions, Washington does not have the problems that exist under the federal guidelines.

7.3(f) Revocation of Conditional Release

In the past there has been a split of authority on whether the exclusionary rule extends to parole or probation revocation hearings. *Compare Vandemark*, 522 F.2d at 1022 (exclusionary rule does not apply to probation revocation proceedings when officers conducting search did not

know and had no reason to believe suspect was probationer), *and Richardson v. State*, 841 P.2d 603, 605–06 (Okla. Crim. App. 1992) (rule does not apply to revocation hearings, but may apply in cases of particularly egregious misconduct), *with United States v. Workman*, 585 F.2d 1205, 1209 (4th Cir. 1978) (rule applies to probation revocation). However, the U.S. Supreme Court determined in 1998 that the exclusionary rule does not apply to parole revocation hearings. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–66, 118 S. Ct. 2014, 2020–21, 141 L. Ed. 2d 344, 352–53 (1998). In *Scott*, parole officers found firearms, a bow, and arrows when they entered the parolee's home based on evidence of parole condition violations. *Id.* at 360, 118 S. Ct. at 2018, 141 L. Ed. 2d at 349. At the parolee's parole violation hearing, the hearing examiner rejected his objection that introduction of the weapon evidence was improper because the search was unreasonable under the Fourth Amendment. *Id.* Writing for the majority, Justice Thomas explained that applying the exclusionary rule would both hinder the functions of the state parole systems and alter the traditionally flexible administrative nature of parole revocation proceedings, while it would provide only minimal deterrence benefits in this context because application of the rule in the criminal trial context already provides significant deterrence of unconstitutional searches. *Id.* at 364, 118 S. Ct. at 2020, 141 L. Ed. 2d at 352. He went on to state that because the exclusionary rule precludes consideration of reliable, probative evidence, it imposes significant costs by detracting from the truthfinding process and allowing many who would otherwise be incarcerated to escape consequences. *Id.* Although these costs are worth bearing in certain circumstances, said the Court, the rule's "costly toll" upon truth-seeking and law enforcement objectives presents a high obstacle for expanded application of the rule, particularly in the context of parole revocation proceedings because parole is a "variation on imprisonment of convicted criminals." *Id.* at 364–65, 118 S. Ct. at 2020, 141 L. Ed. 2d at 352.

Some courts have suggested that the exclusionary rule should apply when the arresting officer knows that the victim is on conditional release; otherwise, a zealous officer would have less incentive to obey the Constitution knowing that illegally seizing the evidence could send the parolee back to prison. *See Workman*, 585 F.2d 1205; *Vandemark*, 522 F.2d 1019.

Washington courts are also divided on whether Article I, Section 7 requires the application of the exclusionary rule to probation revocation hearings. *State v. Murray*, 110 Wn.2d 706, 708–09, 757 P.2d 487, 488 (1988) (en banc) (recognizing the division and uncertainty that exists around Article I, Section 7's exclusionary rule in revocation hearings, but

not resolving the uncertainty). *Compare State v. Kuhn*, 7 Wn. App. 190, 194, 499 P.2d 49, 51–52 (1972) (rule excluding evidence obtained as result of an illegal search is not applicable to probation revocation hearings), *and State v. Proctor*, 16 Wn. App. 865, 867, 559 P.2d 1363, 1364 (1977) (rule against illegal search only applies in probation revocation proceedings if police are aware suspect is on probation and act in bad faith in conducting search), *with State v. Lampman*, 45 Wn. App. 228, 232, 724 P.2d 1092, 1095 (1986) (requiring application without exception to probation revocation proceedings).

However, under Article I, Section 7, a parolee does have a diminished right to privacy, and a warrantless search of the parolee may be made by a law enforcement officer with a well-founded suspicion that a probation violation has occurred. *Lampman*, 45 Wn. App. at 233 (fact of parolee's flight, in light of officer's knowledge, created a well-founded suspicion that a parole violation had occurred). *See* 3 Wayne R. LaFave, *Search and Seizure* § 6.2(a), at 330 (4th ed. 2004).

7.3(g) Federal Habeas Corpus Proceeding

The exclusionary rule does not require habeas corpus relief when the State granted the defendant a full and fair opportunity to litigate all Fourth Amendment claims. *Stone v. Powell*, 428 U.S. 465, 486, 96 S. Ct. 3037, 3048, 49 L. Ed. 2d 1067, 1083 (1976).

7.3(h) Perjury

Illegally seized evidence may be used to support a perjury conviction. *See United States v. Raftery*, 534 F.2d 854, 857 (9th Cir. 1976); *United States v. Turk*, 526 F.2d 654, 667 (5th Cir. 1976) (cautioning against per se admissibility; suggesting that exclusion may sometimes have deterrent effect).

7.4 Application of the Rule in Quasi-Criminal, Civil, and Administrative Proceedings

The exclusionary rule has been applied in forfeiture proceedings, requiring the suppression of any illegally seized evidence used to prove the criminal violation justifying the forfeiture. *See, e.g.*, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702, 85 S. Ct. 1246, 1251, 14 L. Ed. 2d 170, 176 (1965) (exclusionary rule is applicable to forfeiture proceedings); *Deeter v. Smith*, 106 Wn.2d 376, 378–79, 721 P.2d 519, 520–21 (1986) (en banc) (holding that the exclusionary rule applies for the purposes of the Fourth Amendment because civil forfeitures are

quasi-criminal in nature); *People v. Zimmerman*, 44 Ill. App. 3d 601, 604, 358 N.E.2d 715, 718, 3 Ill. Dec. 317 (1976).

7.4(a) Juvenile Delinquency Proceedings

The exclusionary rule has generally been applied in juvenile delinquency proceedings. *In re Robert T.*, 8 Cal. App. 3d 990, 993, 88 Cal. Rptr. 37, 38 (1970); *In re Marsh*, 40 Ill. 2d 53, 55, 237 N.E.2d 529, 531 (1968). However, some courts have recognized that the rule does not apply to juvenile dependency proceedings based on the potential harm to a child who remains in an unhealthy environment. *See, e.g., In re Christopher B.*, 82 Cal. App. 3d 608, 615, 147 Cal. Rptr. 390, 394 (1978).

7.4(b) Narcotics Addict Commitment Proceedings

The exclusionary rule has been applied in narcotics addict commitment proceedings. *See People v. Moore*, 69 Cal. 2d 674, 682, 446 P.2d 800, 72 Cal. Rptr. 800 (1968), *overruled on other grounds by People v. Thomas*, 19 Cal. 3d 630, 644–45, 566 P.2d 228, 139 Cal. Rptr. 594 (1977); *but see Conservatorship of Susan T.*, 8 Cal. 4th 1005, 1019–20, 884 P.2d 988, 40 Cal. Rptr. 2d 40 (1994) (rule not applicable to conservatorship proceedings because of concern for individual's well-being and society's safety).

7.4(c) Civil Tax Proceedings

The exclusionary rule is not applied in civil tax proceedings when state officials turn over illegally seized tax records to the IRS. *United States v. Janis*, 428 U.S. 433, 457–60, 96 S. Ct. 3021, 3033–35, 49 L. Ed. 2d 1046, 1062–64 (1976). *But see Pizzarello v. United States*, 408 F.2d 579, 586 (2d Cir. 1969) (tax assessment invalid if based substantially on illegally obtained evidence). *See generally* 1 Wayne R. LaFave, *Search and Seizure* § 1.7(d), at 229–35 (4th ed. 2004).

Nor does the exclusionary rule apply when IRS agents violate internal regulations as long as no constitutional or statutory rights are infringed. *United States v. Snowadzki*, 723 F.2d 1427, 1430–31 (9th Cir. 1984) (involving seizure of documents by defendant's coworker who was not acting as a government agent).

7.4(d) Administrative Proceedings

Most courts apply the exclusionary rule in administrative hearings when the disposition is relatively significant and when application of the rule is likely to deter unlawful searches and seizures. *See New Brunswick v. Speights*, 157 N.J. Super. 9, 20–21, 384 A.2d 225 (1978) (policy of

deterring unlawful governmental conduct may be significant when subsequent disciplinary hearing directed at police officer charged with criminal violations was foreseeable at time of search or seizure); *Governing Bd. of Mountain View Sch. Dist. v. Metcalf*, 36 Cal. App. 3d 546, 551, 111 Cal. Rptr. 724 (1974) (recognizing rule may be applied in administrative hearings, but holding that rule is not applicable in teacher-dismissal proceeding based on immoral conduct because primary purpose of proceeding is to protect school children). *But see Thanhauser v. Milprint, Inc.*, 192 N.Y.S.2d 911, 912, 9 A.D.2d 833, 833 (N.Y. App. Div. 1959) (claimant's statement, taken while claimant under sedation and in severe pain, is admissible in worker's compensation hearing, but weight is for board to decide).

7.4(e) Legislative Hearings

Whether the exclusionary rule applies in a legislative hearing depends on whether the evidence was seized with the intent to use it at the hearing; if it was, then application of the rule will have a significant deterrent value. *United States v. McSurely*, 473 F.2d 1178, 1194 (D.C. Cir. 1972) (when defendant is prosecuted for contempt of Congress, court must exclude evidence derived from unlawful search and seizure by congressional committee investigator); *see also Watkins v. United States*, 354 U.S. 178, 205, 77 S. Ct. 1173, 1188, 1 L. Ed. 2d 1273, 1294 (1957) ("Protected freedoms should not be placed in danger in absence of clear determination by House or Senate that particular inquiry is justified by specific legislative need.").

7.4(f) Private Litigation

The exclusionary rule is not applied in suits between private parties. *Honeycutt v. Aetna Ins. Co.*, 510 F.2d 340, 348 (7th Cir. 1975) (Fourth and Fourteenth Amendments do not require exclusion of evidence obtained illegally by state police when private parties seek to introduce evidence in civil proceeding); *Sackler v. Sackler*, 15 N.Y.2d 40, 42, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) (evidence of wife's adultery obtained by illegal entry into wife's home by husband and private investigators admissible in divorce action). Even evidence illegally seized by the government may be introduced into a private proceeding, as exclusion would have little deterrent value because the State is not a party to the proceeding and would have nothing to gain from a Fourth Amendment violation. *Honeycutt*, 510 F.2d at 348.

States, however, may rely on their own laws to bar the use of illegally-seized evidence in private litigation to promote the following policies: (1) depriving transgressors of the fruits of their wrongs; (2) deter-

ring lawless behavior; and (3) discouraging violence. *See Kassner v. Frement Mut. Ins. Co.*, 47 Mich. App. 264, 266, 209 N.W.2d 490 (1973) (unlawful search of premises destroyed by fire represents significant invasion of privacy; thus, evidence seized as result of search not admissible in civil case). The issue has not been reviewed under the Washington State Constitution.

7.5 APPLICATION OF THE RULE TO SEARCHES BY PRIVATE INDIVIDUALS: GENERAL PRINCIPLE

Because the Fourth Amendment is a limitation on the government only, federal courts do not exclude the fruits of a private search. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 576, 65 L. Ed. 1048, 1051 (1921) (papers obtained through theft by a private individual and delivered to federal prosecutors admissible against defendant); *see United States v. Jacobsen*, 466 U.S. 109, 117, 104 S. Ct. 1652, 1658, 80 L. Ed. 2d 85, 96 (1984) (a private freight carrier notified government agents that a damaged package contained a white powdery substance; information held admissible, because "when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs[,] the Fourth Amendment does not prohibit governmental use of that information").

Article I, Section 7 does not apply to searches by private citizens acting on their own initiative. *State v. Clark*, 48 Wn. App. 850, 855, 743 P.2d 822, 826 (1987). The protection from private searches afforded by Article I, Section 7 is, thus, coextensive with the protection afforded by the Fourth Amendment. *State v. Dold*, 44 Wn. App. 519, 524–25, 722 P.2d 1353, 1357 (1986). The fact that the person conducting the search may be a public employee does not lend an element of state action to the search if the search is not related to the employee's official duties and is undertaken solely in his capacity as a private citizen. *State v. Ludvik*, 40 Wn. App. 257, 263, 698 P.2d 1064, 1068 (1985) (state game warden, residing across the street from defendant, observed suspected drug transactions and informed police). *But see State v. Faford,* 128 Wn.2d 476, 488–89, 910 P.2d 447, 453 (1996) (en banc) (independent basis required for police search made pursuant to information obtained by the police from a nosey neighbor who was eavesdropping on the defendant's cordless telephone conversations).

When a private party acting independently of the government conducts a search and delivers the material to the police, neither the Fourth Amendment, nor Article I, Section 7 require the police to obtain a search warrant before examining the material if the government search does not exceed the scope of that previously conducted by the private party. *In re*

Teddington, 116 Wn.2d 761, 766, 808 P.2d 156, 158 (1991) (en banc) (no violation when sergeant inventoried defendant's locker after soldier was arrested for murder and turned over incriminating letter to police); *State v. Walter*, 66 Wn. App. 862, 866, 833 P.2d 440, 443 (1992) (no violation when photo lab turns pictures over to police); *State v. Bishop*, 43 Wn. App. 17, 20, 714 P.2d 1199, 1200 (1986) (no violation when police reopened packets and tested substance that was found by private security guard in the telephone mouthpiece of defendant's hospital room); *Dold*, 44 Wn. App. at 522 (no violation where police investigation of defendant based on receipt of a letter addressed to defendant, but delivered to a private party, who forwarded it to police); *cf. Kuehn v. Renton School Dist. No. 403*, 103 Wn.2d 594, 600, 694 P.2d 1078, 1081 (1985) (en banc) (when private person acts under authority of state, Fourth Amendment applies; thus, lawfulness of school search of students' luggage is not dependent upon whether person conducting search is band director, principal, or parent); *State v. Slattery*, 56 Wn. App. 820, 826, 787 P.2d 932, 935 (1990) (recognizing "school search exception" for teachers and when reasonably justified based on circumstances).

7.6 Searches by Private Individuals: Particular Applications

A private search becomes a state search if the private party acts as an agent for the government or the two are engaged in a joint endeavor. *See State v. Swenson*, 104 Wn. App. 744, 753, 9 P.3d 933, 938 (2000); *State v. Clark*, 48 Wn. App. 850, 855–856, 743 P.2d 822, 826 (1987). A private search may also be considered a state search when the party conducting the search acts on behalf of the public or with the purpose of aiding the government. *See, e.g., In re Robert T.*, 8 Cal. App. 3d 990, 993–94, 88 Cal. Rptr. 37 (1970) (entry by deceit considered government action when landlord introduced plainclothes officer as companion in order to gain access to apartment to search for stolen goods). A criminal defendant has the burden of proving that a private citizen conducted the search as an agent or instrumentality of the state. *Swenson*, 104 Wn. App. at 754; *Clark*, 48 Wn. App. at 856. No agency relationship exists unless the state actively encourages or instigates the citizen's actions. *See Clark*, 48 Wn. App at 856–57. Factors to be considered include the State's knowledge of and acquiescence in the search and whether the citizen's intent was to assist law enforcement efforts or to further his or her own end. *Swenson*, 104 Wn. App. at 754–55 (father intended to assist police by obtaining defendant's phone records, and although police knew of the father's efforts, there was no evidence that they instigated, encouraged, counseled, or directed the father to obtain the phone records); *Clark*, 48 Wn. App. at 856 (friend of defendant who had entered into an immunity

agreement in return for testimony was not acting as agent of state when he turned over to police incriminating evidence belonging to defendant).

A minority of jurisdictions hold that any illegally obtained evidence is inadmissible, regardless of who performed the unlawful act. *See Sackler v. Sackler*, 15 N.Y.2d 40, 45–48, 203 N.E.2d 481, 255 N.Y.S.2d 83 (1964) (Van Voorhis, J., dissenting). For a discussion of the admissibility of evidence illegally obtained by a private person, see Paul G. Reiter, J.D., Annotation, *Admissibility, in Criminal Case, of Evidence Obtained by Search by Private Individual*, 36 A.L.R.3d 553, 575–84 (1971 & Supp. 2004).

7.6(a) Agency Theory

Under agency theory, a search is not private if ordered or requested by a government officer. *Burdeau v. McDowell*, 256 U.S. 465, 474–75, 41 S. Ct. 574, 575–76, 65 L. Ed. 1048, 1050–51 (1921). For example, a search by an airline employee was not private when conducted at the request and under the supervision of government agents. *United States v. Valen*, 479 F.2d 467, 468–70 (3d Cir. 1973) (citing *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966)) (contrasting the airline employee example in *Corngold* with the facts at hand to determine that a search was private; the court found that the individual who conducted the search in *Valen*, a shipping company employee, acted independently when he searched a suspicious bag and delivered its contents to U.S. Customs Agents, despite the fact that the government compensated the employee for his assistance and that he had received compensation in the past for providing other information). *See also New Jersey v. T.L.O.*, 469 U.S. 325, 336, 105 S. Ct. 733, 740, 83 L. Ed. 2d 720, 731 (1985) (holding that a search by school officials is not a private search because school officials act as representatives of the state, not as surrogates for parents, and they cannot claim the parents' immunity from Fourth Amendment strictures); *United States v. Jacobsen*, 466 U.S. 109, 111–18, 104 S. Ct. 1652, 1655–59, 80 L. Ed. 2d 85, 92–97 (1984) (warrant not needed where the employees of a private freight company invite government agent to examine contents of damaged package).

7.6(b) Joint Endeavor Theory

Under a joint endeavor theory, when the police accompany a citizen on a search it becomes a government search. *State v. Scrotsky*, 39 N.J. 410, 415, 189 A.2d 23 (1963). "It is immaterial whether the official originates the idea, or simply joins the search while it is in progress." *Lustig v. United States*, 338 U.S. 74, 79, 69 S. Ct. 1372, 1374, 93 L. Ed. 1819, 1823 (1949). Tacit governmental approval of a private entry may

also convert a private search into state action. *State v. Becich*, 13 Or. App. 415, 419, 509 P.2d 1232 (1973).

A search will be considered private, however, if it is undertaken in direct contravention to police instructions. *United States v. Maxwell*, 484 F.2d 1350, 1352 (5th Cir. 1973). Even if the police are summoned before the search begins and are present as it occurs, the search may still be considered private if a private purpose is served. *United States v. Lamar*, 545 F.2d 488, 490 (5th Cir. 1977) (heroin admissible when discovered by airline agent who opened unclaimed bag to determine its owner, because it was a private search even though a police officer was present during search); *see also United States v. Sherwin*, 539 F.2d 1, 16 (9th Cir. 1976) (allegedly obscene books admissible when discovered by shipping manager and delivered to FBI); *Berger v. State*, 150 Ga. App. 166, 168, 257 S.E.2d 8, 10 (1979) (contraband discovered in briefcase by hotel manager and security personnel admissible because purpose of search was to determine owner of lost or misplaced property); *cf. Corngold v. United States*, 367 F.2d 1, 5–6 (9th Cir. 1966) (contraband discovered by airline agents inadmissible when government agents actively joined in search).

7.6(c) Public Function Theory

Evidence obtained by store detectives, security officers, and insurance investigators is generally admissible. *See United States v. Lima*, 424 A.2d 113, 121 (D.C. 1980) (en banc); Reiter, *supra,* at 567–71. Searches by off-duty police officers are considered private if the officers acted as private citizens and if the search or seizure was unconnected with their duties as police officers. *People v. Wachter*, 58 Cal. App. 3d 911, 920–21, 130 Cal. Rptr. 279 (1976) (deputy sheriff acted as private citizen when he notified law enforcement officials of defendant's marijuana plants).

But when a private party acts as a police officer, has a strong interest in obtaining convictions, and is familiar with search and seizure law, the purposes of the exclusionary rule are served by suppression and the rule will apply. *See Commonwealth v. Eshelman*, 477 Pa. 93, 100, 383 A.2d 838 (1978) (off-duty police officer considered acting as government agent when he trespassed, seized suspicious-looking package from car, and handed package over to police); *Stapleton v. Superior Court*, 70 Cal. 2d 97, 102, 447 P.2d 967, 73 Cal. Rptr. 575 (1968) (police participation in planning car search that was conducted by credit card agent marked subsequent actions of agent with imprimatur of state action).

For examples of private action constituting state action in contexts other than search and seizure cases, see *Jackson v. Metro. Edison Co.*,

419 U.S. 345, 95 S. Ct. 449, 42 L. Ed. 2d 477 (1974); *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

7.6(d) Ratified Intent and Judicial Action Theory

A majority of jurisdictions have decided that when evidence is seized to aid the government and when the government had prior knowledge that the seizure would occur, the taint of the illegal action is transferred to the government. *See United States v. Mekjian*, 505 F.2d 1320, 1327–28 (5th Cir. 1975) (copies of fraudulent claims allowed into evidence because defendant failed to prove that federal investigators knew nurse had illegally copied records for government use).

7.7 FRUIT OF THE POISONOUS TREE: GENERAL RULE

The extent to which evidence related to an illegal search or seizure may be suppressed depends on the extent to which the evidence derives from exploitation of the illegality. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417, 9 L. Ed. 2d 441, 455 (1963) ("[T]he . . . question . . . is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.") (internal quote omitted); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319, 321 (1920) (when police unlawfully seized documents, made copies of the documents, and returned the originals, the copies were inadmissible); *State v. Byers*, 88 Wn.2d 1, 10, 559 P.2d 1334, 1338 (1977) (en banc) (finding that where defendants' confessions were obtained as a result of being in custody after an unlawful arrest and as a result of being confronted with evidence seized in an unlawful search pursuant to that arrest, confessions were inadmissible in evidence, even if they were voluntary); *State v. McReynolds*, 104 Wn. App. 560, 571, 17 P.3d 608, 615 (2002) (court remanded for lack of findings regarding whether subsequently obtained evidence from valid warrants was tainted by an illegal search); *State v. Magneson*, 107 Wn. App. 221, 226–27, 26 P.3d 986, 989 (2001) (finding that evidence was not admissible under the plain view doctrine when officers entered an individual's home with what was later determined to be an invalid search warrant and seized drugs from a third person in the home at the time of the search). The following sections discuss three tests that have been used to determine whether a given piece of evidence constitutes "fruit of the poisonous tree" that should be suppressed. *See generally* 6 Wayne R. LaFave, *Search and Seizure* § 11.4, at 254–58 (4th ed. 2004).

7.7(a) Attenuation Test

The attenuation test suggests that at some point the taint of evidence becomes so dissipated as to preclude suppression. 6 LaFave, *supra,* § 11.4, at 256–57. That point arises when the detrimental consequences of excluding the evidence becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost. *Brown v. Illinois*, 422 U.S. 590, 608–09, 95 S. Ct. 2254, 2264–65, 45 L. Ed. 2d 416, 430–31 (1975) (Powell, J., concurring); *State v. Spotted Elk*, 109 Wn. App. 253, 262, 34 P.3d 906, 911 (2001) (finding that the defendant's and parole officer's testimony was insufficiently attenuated from a law enforcement officer's *Miranda* violation because the defendant's improperly admitted incriminatory statements regarding heroin compelled her to explain and later testify about why she was carrying the substance); *State v. Reid*, 38 Wn. App. 203, 213, 687 P.2d 861, 868 (1984). For example, in *Reid*, the police arrested the defendant shortly after he emerged from his apartment building and got into a car. 38 Wn. App. at 205. When the defendant refused to identify which apartment unit he had exited, police seized the defendant's keys from the car, entered the building, and used the keys to unlock the door to one of the apartments. *Id.* at 205–6. The police then entered the apartment, observed evidence in plain view, and later returned and seized the evidence pursuant to a warrant. *Id.* at 206. The court reasoned that even if the initial seizure of the keys was unlawful, the evidence taken from the apartment would be admissible because the seizure of the evidence "was so attenuated that the taint of the seizure of the keys had dissipated." *Id.* at 208–09. "Bystanders had identified the door through which the defendant had often entered and exited. [Thus,] the keys were not utilized in the manner of a divining rod to locate [the defendant's] apartment but rather to facilitate access to [the] residence and to confirm from which door the defendant had exited." *Id.* at 209.

One commentator has suggested the following criteria for establishing whether the fruit of the unlawful search or seizure is too attenuated to warrant suppression.

> (1) [W]here the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only by "sophisticated argument" exclusion would seem inappropriate. In such a case it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their illegality; thus [the discovery of the evidence would] not have been a motivating force behind [the search].

Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. Pa. L. Rev. 1136, 1148–49 (1967). Consequently, the threat of exclusion would not operate as a deterrent when:

> (2) [The evidence] is used for some relatively insignificant or highly unusual purpose. Under these circumstances, it is not likely, that, at the time the primary illegality was contemplated, the police foresaw or were motivated by the potential use of the evidence and the threat of exclusion would, therefore, effect no deterrence.
>
> (3) [T]he unlawful police conduct is minimally offensive. Because "the purpose of the exclusionary rule is to deter undesirable police conduct, where that conduct is particularly offensive the deterrence ought to be greater and . . . the scope of exclusion broader."

Id. at 1149–51.

7.7(b) Independent Source Test

When evidence has been obtained lawfully, the fact that police also came by the evidence unlawfully does not make it suppressible. *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377, 387–88 (1984) (location of murdered child's body derived from coerced statement was not suppressed when searchers would have located child anyway); *State v. O'Bremski*, 70 Wn.2d 425, 429–30, 423 P.2d 530, 533 (1967) (when a missing child was found during an unlawful search of an apartment, the child's testimony was admissible because she was not discovered solely as result of unlawful search; witness had also informed police that he knew where the child was); *State v. Smith*, 113 Wn. App. 846, 855–57, 55 P.3d 686, 690–91 (2002) (holding, not only that an illegal search without an immediate seizure of observed marijuana plants does not make the evidence suppressible because the plants were subsequently seized pursuant to a search warrant, but also holding that, if the marijuana plants had been seized as part of the illegal search, the same plants would still not be suppressible because they would have been subject to seizure pursuant to the subsequent execution of a valid search warrant).

The case for admitting the evidence is stronger when the independent legal source is known prior to the police illegality. *United States v. Barrow*, 363 F.2d 62, 66 (3d Cir. 1966) (testimony of witness found on premises of gambling casino during illegal search admissible when witness' identity as casino patron was previously learned through observations made by federal agents); *see also United States v. Giglio*, 263 F.2d 410, 413 (2d Cir. 1959).

Finally, when the unlawful search or seizure results in the police only "focusing" their investigation on a particular individual, subsequently obtained evidence is not suppressible even if police would not have been able to focus the investigation but for the illegality. *United States v. Friedland*, 441 F.2d 855, 859 (2d Cir. 1971); *see also United States v. Bacall*, 443 F.2d 1050, 1056 (9th Cir. 1971) (even when evidence can be traced to leads resulting from illegal search, evidence is admissible if government in fact learned of evidence from independent source).

7.7(c) Inevitable Discovery Test

Evidence obtained as a result of unlawful police action is admissible when the police inevitably would have obtained the evidence lawfully. *Nix*, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387–88; *see also Somer v. United States*, 138 F.2d 790, 792 (2d Cir. 1943); *State v. Warner*, 125 Wn.2d 876, 888, 889 P.2d 479, 484 (1995) (relying on federal precedent); *State v. McReynolds*, 117 Wn. App. 309, 324, 71 P.3d 663, 669 (2003); *State v. Richman*, 85 Wn. App. 568, 570, 933 P.2d 1088, 1090 (1997) (applying the inevitable discovery rule after conducting a detailed state constitutional analysis); *Reid*, 38 Wn. App. at 209 n.6, 687 P.2d at 866 n.6. The Inevitable Discovery doctrine has been found to be in concert with the goals of the exclusionary rule (to deter unlawful police conduct and protect individual rights), based on the logic that if the outcome would have been the same without the illegality, excluding the evidence defies logic and common sense because police would be in a worse position than if they had not performed an illegal act. *State v. Avila-Avina*, 99 Wn. App. 9, 17–19, 991 P.2d 720, 726 (2000).

The State bears the burden of proving by a preponderance of the evidence that the evidence would have been inevitably discovered through lawful means. *Nix*, 467 U.S. at 444, 104 S. Ct. at 2509, 81 L. Ed. 2d at 387; *State v. O'Neill*, 148 Wn.2d 564, 591–92, 62 P.3d 489, 504 (2003) (en banc); *State v. Reyes*, 98 Wn. App. 923, 926–34, 993 P.2d 921, 923–27 (2000); *Warner*, 125 Wn.2d at 889. Washington has recognized that "absolute inevitability of discovery is not required[,] but simply a reasonable probability" that the evidence would have been discovered from an untainted source. *Id.* (recognizing lengthy statute of limitations for child rape increased likelihood of eventual discovery).

The inevitable discovery test applies even when the State cannot show that the police acted in good faith in accelerating the discovery of the evidence. *Nix*, 467 U.S. at 445, 104 S. Ct. at 2510, 81 L. Ed. 2d at 388 (under inevitable or ultimate discovery exception to exclusionary

rule, prosecution is not required to prove absence of bad faith). *But see Richman*, 85 Wn. App. at 572–573 (recognizing the additional requirements that the police must not have acted unreasonably or attempted to accelerate discovery in addition to the inevitability of discovery). *See generally* Robert F. Maguire, *How to Unpoison the Fruit—The Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L. & Criminology 307, 315 (1964).

7.8 Particular Applications of the Fruit of the Poisonous Tree Doctrine

7.8(a) Confession as Fruit of Illegal Arrest

Generally, when the defendant confesses voluntarily, a court may admit a defendant's confession into evidence consistent with the Fifth Amendment. *Jackson v. Denno*, 378 U.S. 368, 379, 84 S. Ct. 1774, 1782, 12 L. Ed. 2d 908, 917 (1964). However, when a confession is the fruit of an illegal search or seizure, the court must also ensure that the distinct policies of the Fourth Amendment are satisfied. *Brown v. Illinois*, 422 U.S. 590, 600–03, 95 S. Ct. 2254, 2260–61, 45 L. Ed. 2d 416, 425–27 (1975), *see State v. Dane*, 89 Wn. App. 226, 233–34, 948 P.2d 1326, 1329–30 (1997). For example, a confession made immediately upon an illegal entry and arrest is excludable, but when a suspect is released after an illegal arrest and later returns to the police station to make a confession, the confession is admissible because its taint has dissipated. *Wong Sun v. United States*, 371 U.S. 471, 491, 83 S. Ct. 407, 419, 9 L. Ed. 2d 441, 454 (1963).

The factors considered in determining whether the taint of a confession has dissipated, hereinafter referred to as the *Brown* factors, are the following:

> (1) the giving of Miranda warnings, although the warnings taken alone do not constitute a per se break in the causality between the illegality and the confession;
>
> (2) the temporal proximity of the arrest and the confession;
>
> (3) the presence of intervening circumstances; and
>
> (4) the purpose and egregiousness of the official misconduct.

Brown, 422 U.S. at 603–05, 95 S. Ct. at 2262, 45 L. Ed. 2d at 428; *accord State v. Byers*, 88 Wn.2d 1, 8, 559 P.2d 1334, 1338 (1977) (en banc); *see also Rawlings v. Kentucky*, 448 U.S. 98, 110, 100 S. Ct. 2556,

2564, 65 L. Ed. 2d 633, 645 (1980); *State v. Johnston*, 38 Wn. App. 793, 800–01, 690 P.2d 591, 595 (1984).

When a person is unlawfully detained because probable cause is lacking, but is not formally arrested, if his or her confession is causally connected to the detention, the confession is not admissible even if the person was first given Miranda warnings. *Dunaway v. New York*, 442 U.S. 200, 217–18, 99 S. Ct. 2248, 2259, 60 L. Ed. 2d 824, 839–40 (1979).

7.8(b) Confession as Fruit of Illegal Search

Dissipation of the taint and the *Brown* factors do not apply to a confession following an unlawful search, as opposed to one following an unlawful arrest, because a suspect is more likely to confess as a result of a search. *People v. Robbins*, 54 Ill. App. 3d 298, 304–05, 369 N.E.2d 577, 12 Ill. Dec. 80 (1977). Thus, a confession is suppressible if it would not have been made but for the illegal search. *See State v. White*, 97 Wn.2d 92, 102–04, 640 P.2d 1061, 1067–68 (1982) (en banc). *But cf. United States v. Green*, 523 F.2d 968, 972 (9th Cir. 1975) (defendant's admission allowed into evidence when admission followed government agents' confronting defendant with both legally and illegally seized products of search); *United States v. Trevino*, 62 F.R.D. 74, 77 (S.D. Tex. 1974) (defendant's admissions allowed into evidence even though they were the result of an illegal search; defendant testified at pretrial hearing that he "probably would have" made admissions even in absence of search).

7.8(c) Search as Fruit of Illegal Arrest or Detention

When a search is incidental to an illegal arrest, the fruits of the search are suppressible unless intervening factors, such as a valid arrest, occur between the illegal arrest and the search. *United States v. Walker*, 535 F.2d 896, 898–99 (5th Cir. 1976).

A search following an illegal arrest may be purged of the taint by voluntary consent to the search as proven by the prosecution; the voluntariness of the consent may be determined by reference to the *Brown* factors, as outlined *supra* § 7.8(a). *See generally* 6 Wayne R. LaFave, *Search and Seizure* § 11.4(b), at 287–305 (4th ed. 2004). *See State v. Fortier*, 113 Ariz. 332, 335, 553 P.2d 1206 (1976) (en banc); *see also State v. Shoemaker*, 85 Wn.2d 207, 212, 533 P.2d 123, 125 (1975) (en banc); *Avila-Avina*, 99 Wn. App. at 15–16 (stating that the "voluntariness of the consent is a threshold requirement but is not alone sufficient to purge the evidence of the primary taint"); *cf.* 4 LaFave, *supra*, § 8.1(a)-(c), at 4–50. Courts have also considered the totality of circumstances to

determine whether voluntary consent to search existed. *State v. O'Neill*, 148 Wn.2d 564, 588–59, 62 P.3d 489, 502–03 (2003) (en banc) (stating that repeated requests for consent is one factor to consider); *State v. Tagas*, 121 Wn. App. 872, 876, 90 P.3d 1088, 1091 (2004) (agreeing that totality of circumstances is normally the appropriate test).

Some courts have held that when the execution of a search warrant is preceded by an illegal arrest of the person who lives at the place searched, the evidence derived is automatically excluded. *See, e.g., People v. Shuey*, 13 Cal. 3d 835, 850, 533 P.2d 211, 120 Cal. Rptr. 83 (1975). *But see State v. Fenin*, 154 N.J. Super. 282, 289, 381 A.2d 364 (1977) (evidence of both possession and possession with intent to distribute a controlled substance is admissible although preceded by illegal search because evidence was obtained pursuant to valid warrant and not as the result of illegal search).

7.8(d) Search as Fruit of Illegal Search

When the issuance of a search warrant is based upon untainted evidence, the fact that an illegal search took place prior to securing the valid warrant will not invalidate the execution of that warrant, and evidence seized during the execution will be admissible. *Segura v. United States*, 468 U.S. 796, 814, 104 S. Ct. 3380, 3391, 82 L. Ed. 2d 599, 614–15 (1984) (second search of home is not tainted by prior illegal entry).

Generally, warrants are considered valid if they could have been issued based upon the untainted information in the affidavit. *See United States v. Marchand*, 564 F.2d 983, 1001–02 (2d Cir. 1977) (when lawfully obtained evidence is sufficient to justify issuance of warrant, the fact that officer might not have sought warrant but for receipt of illegally obtained evidence does not require suppression of fruits of search made pursuant to warrant); *United States v. DiMuro*, 540 F.2d 503, 515 (1st Cir. 1976); *United States v. Nelson*, 459 F.2d 884, 889 (6th Cir. 1972). Yet, where a warrant is supported by tainted and untainted evidence in an affidavit, and the untainted evidence alone does not establish probable cause, evidence seized pursuant to the warrant must be excluded. *State v. Ross*, 141 Wn.2d 304, 314–15, 4 P.3d 130, 136 (2000).

7.8(e) Arrest as Fruit of Illegal Search

If an arrest is based solely on information derived from an illegal search, the arrest is tainted and void. *Marchand*, 564 F.2d at 1002; *see Sheff v. Florida*, 329 So. 2d 270 (1976).

7.8(f) Identification of Suspect as Fruit of Illegal Arrest

Courts differ as to whether to exclude suspect identifications made as a result of an illegal arrest exemplified by the following four subsections:

7.8(f)(1) Lineup and Other Post-Arrest Identification

Courts have reached conflicting conclusions on the suppression of lineup and other post-arrest identifications resulting from illegal arrests. *See Commonwealth v. Garvin*, 448 Pa. 258, 266, 293 A.2d 33, 37–38 (1972) (permissible to introduce lineup evidence obtained as result of illegal arrest). *But see State v. Le*, 103 Wn. App. 354, 362–65, 12 P.3d 653, 657–59 (2000) (finding that a post-arrest identification by one officer immediately after warrantless arrest was not attenuated from the illegal arrest and disagreeing with the *Garvin* rationale "for it erases the taint by conveniently assuming that the police would eventually effect a lawful arrest of the defendant . . . such a result would eviscerate the exclusionary rule by readily excusing police failure to obtain a warrant"). Some courts have used the *Brown* factors in determining whether lineup identifications are admissible. *See Johnson v. Louisiana*, 406 U.S. 356, 365, 92 S. Ct. 1620, 1626, 32 L. Ed. 2d 152, 161 (1972) (defendant may consent to lineup and hence break taint); *State v. McMahon*, 116 Ariz. 129, 133, 568 P.2d 1027 (1977) (en banc) (post-arrest discovery of information connecting defendant with another crime dissipates taint of illegal lineup if new information comes to light before lineup occurs and illegal arrest is not made with intent to obtain lineup evidence). Courts have also examined the purpose and flagrancy of the official misconduct. *See generally* 6 Wayne R. LaFave, *Search and Seizure* § 11.4(a)–(j), 258–380 (4th ed. 2004).

7.8(f)(2) At-Trial Identification

When both the police officer's knowledge of the accused's identity and the victim's independent recollection of the accused antedate the unlawful arrest, an in-court identification of the accused by the victim is untainted by either the arrest or the pretrial identification arising therefrom. *United States v. Crews*, 445 U.S. 463, 474, 100 S. Ct. 1244, 1251, 63 L. Ed. 2d 537, 547–48 (1980); *State v. Mathe*, 102 Wn.2d 537, 546–47, 688 P.2d 859, 864 (1984) (en banc). Other factors to be considered in determining whether the at-trial identification is admissible include the following:

(a) the witness' prior opportunity to observe the alleged criminal act;

(b) the existence of any discrepancy between any pre-lineup description and the defendant's actual description;

(c) any identification of another person as the perpetrator prior to the lineup;

(d) the identification of the defendant by picture prior to the lineup;

(e) the failure to identify the defendant on a prior occasion; and

(f) the length of time between the alleged act and the lineup identification.

United States v. Wade, 388 U.S. 218, 241, 87 S. Ct. 1926, 1940, 18 L. Ed. 2d 1149, 1165 (1967). *Compare Payne v. United States*, 294 F.2d 723, 725 (D.C. Cir. 1961) (no taint), *with Garner v. State*, 314 A.2d 908, 912 (Del. Super. Ct. 1973) (in-court identification inadmissible when based solely upon lineup identification that was result of illegal arrest), *and In re Woods*, 20 Ill. App. 3d 641, 649, 314 N.E.2d 606 (1974) (six month lapse between identification that was result of illegal arrest and in-court identification insufficient to purge the primary taint).

When police have made flagrantly illegal arrests for the purpose of securing identifications that otherwise could not have been obtained, the identifications are inadmissible. *United States v. Edmons*, 432 F.2d 577, 584 (2d Cir. 1970).

7.8(f)(3) Photo Identification

A photo identification produced by an unlawful arrest is not admissible. *Crews*, 445 U.S. at 474, 100 S. Ct. at 1251, 63 L. Ed. 2d at 547–48. *But see Johnson v. State*, 496 S.W.2d 72, 74 (Tex. Crim. App. 1973) (photo identification not fruit of illegal arrest when discovery of outstanding warrant was intervening circumstance).

Courts have allowed photos taken during illegal arrests to be used on subsequent occasions to connect suspects with additional, unrelated crimes when the suspects were not originally arrested for the sole purpose of acquiring the photo. *See People v. McInnis*, 6 Cal. 3d 821, 826, 494 P.2d 690, 100 Cal. Rptr. 618 (1972) (use of photo identification permitted after an illegal arrest by law enforcement agency when (1) the arrest was made in good faith; (2) the ultimate charge was wholly unrelated to the charge in the illegal arrest; (3) a different agency pressed charges; and (4) there is no evidence of exploitation of the original arrest); *cf. People v. Pettis*, 12 Ill. App. 3d. 123, 128, 298 N.E.2d 372, 376 (1973) (testimony identifying defendant as perpetrator of offense admis-

sible, even though photo was taken after illegal arrest for unrelated offense).

7.8(f)(4) Fingerprints

Fingerprints must be suppressed when the unlawful arrest was for the purpose of obtaining and using the fingerprints for prosecuting the suspect for the crime that he or she was arrested for. *Davis v. Mississippi*, 394 U.S. 721, 727, 89 S. Ct. 1394, 1397–98, 22 L. Ed. 2d 676, 681 (1969); *see also Paulson v. Florida*, 257 So. 2d 303, 305 (Fla. App. 1972) (because police did not arrest defendant for sole purpose of obtaining fingerprints, fingerprints obtained from arrest for public drunkenness not suppressible at trial for grand larceny).

7.8(g) Identification of Property as Fruit of Illegal Search

Testimony concerning an object seized during an illegal search is inadmissible when the identification of the object is established by use of the illegally seized object. *State v. Swaite*, 33 Wn. App. 477, 484 n.4, 656 P.2d 520, 525 n.4 (1982); *People v. Dowdy*, 50 Cal. App. 3d 180, 187, 123 Cal. Rptr. 155 (1975).

7.8(h) Testimony of Witness as Fruit of Illegal Search

Testimony and physical evidence are treated differently for purposes of the exclusionary rule. *United States v. Ceccolini*, 435 U.S. 268, 277–79, 98 S. Ct. 1054, 1061–62, 55 L. Ed. 2d 268, 278–79 (1978). Verbal testimony carries with it an exercise of free will, and the costs of excluding the evidence are great. Consequently, the ability to suppress a derivative witness's testimony depends on several of the following factors:

(1) whether the witness testified freely, see *United States v. Karathanos*, 531 F.2d 26, 35 (2d Cir. 1976) (testimony by illegal aliens obtained as result of illegal search inadmissible because testimony was prompted by government statements concerning future prosecution);

(2) whether the physical fruits of the illegal search were used in questioning the witness, see *State v. Rogers*, 27 Ohio Op. 2d 105, 198 N.E.2d 796, 806 (1963) (testimony about gun suppressed because witness would not have been questioned about gun but for unlawful search);

(3) whether the search and testimony were close in time, see *Ceccolini*, 435 U.S. at 277–78, 98 S. Ct. at 1061, 55 L. Ed. 2d at 277–78 (witness testimony not excluded where "substantial periods of time" had elapsed between the illegal search and the government's first contact with the witness);

(4) whether the witness's identity and location were known before the search, see *State v. O'Bremski*, 70 Wn.2d 425, 429–30, 423 P.2d 530, 533 (1967) (when parents had sought help from police, police questioned boy, and boy stated girl was in apartment; girl's testimony admissible although girl was found in apartment during illegal search); and

(5) whether the search was made with the intent to find witnesses, see *People v. Martin*, 382 Ill. 192, 201, 46 N.E.2d 997, 1001–02 (1942) (testimony of witnesses suppressed when witness' names were obtained from papers found during illegal search of defendant's premises); see generally *Ceccolini*, 435 U.S. 268, 98 S. Ct. 1054, 55 L. Ed. 2d 268.

7.8(i) Crime Committed in Response to Illegal Arrest or Search

Generally, evidence that the defendant attempted to bribe or attack an officer is admissible even if the arrest was illegal. *United States v. Perdiz*, 256 F. Supp. 805, 806 (S.D.N.Y. 1966); *State v. Mierz*, 127 Wn.2d 460, 473–475, 901 P.2d 286, 292–93 (1995) (en banc). In addition, evidence of a suspect speeding away from an unlawful traffic stop has been found admissible at trial because it is considered sufficiently distinguishable from the unlawful intrusion. *State v. Owens*, 39 Wn. App. 130, 135, 692 P.2d 850, 853 (1984).

The rationale for admitting the evidence is that acts of free will purge the taint; thus, the application of the exclusionary rule would further deterrence only marginally. In addition, exclusion would permit persons unlawfully arrested to assault officers without risk of criminal liability. *Mierz*, 127 Wn.2d at 474. Yet, the evidence would be inadmissible if it were the product of questionable police action. *See id.* at 475; *People v. Cantor*, 36 N.Y.2d 106, 114, 324 N.E.2d 872, 365 N.Y.S.2d 509 (1975) (without identifying themselves, three officers encircled defendant; evidence of defendant pulling gun inadmissible).

7.8(j) Procedural Violation of Warrant Procedures

"[A]bsent a showing of *prejudice* to the defendant, procedural noncompliance does not compel invalidation of an otherwise sufficient warrant or suppression of its fruits." *State v. Aase*, 121 Wn. App. 558, 567, 89 P.3d 721, 725–26 (2004); *State v. Kern,* 81 Wn. App. 308, 311, 914 P.2d 114, 116 (1996) (holding that suppression of evidence is not compelled where a copy of the warrant and the items seized are not given to the defendant resident before commencing an otherwise lawful search because the defendant was not prejudiced by receiving the warrant several minutes after the search began and the search would not have been less intrusive had the defendant been able to immediately see the warrant).

7.9 WAIVER OR FORFEITURE OF OBJECTION

A defendant may waive or forfeit his or her constitutional objection and thus render the objectionable evidence admissible in the following three ways: (1) by failure to make a timely objection, see 6 Wayne R. LaFave, *Search and Seizure* § 11.6, at 396 (4th ed. 2004); (2) by testifying at trial about the evidence, see *id.* § 11.1(c), at 19; and, (3) by entry of a guilty plea, see *id.* § 11.1(d), at 24.

7.9(a) Failure to Make Timely Objection

Jurisdictions have their own rules for what constitutes a timely objection. Washington court rules provide that a defendant's failure to object at the omnibus hearing may constitute a waiver of the objection if the party had knowledge of the illegality of the search or seizure prior to the hearing. *See* Wash. CrR 4.5(d). A defendant's failure to move to suppress evidence at trial that he later contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286, 290 (1995) (en banc). However, a failure to timely object does not waive error when the illegality "is of such a flagrant or prejudicial nature that any curative measure would have been futile." *State v. Van Auken*, 77 Wn.2d 136, 143, 460 P.2d 277, 282 (1969).

7.9(b) Testimony by Defendant Concerning Suppressed Evidence

A defendant may not raise a Fourth Amendment claim on appeal challenging the admission of evidence, notwithstanding a timely objection, if the defendant gave testimony at trial admitting to the possession of that evidence. *See State v. Peele*, 10 Wn. App. 58, 67, 516 P.2d 788, 793 (1973); *Jones v. Texas*, 484 S.W.2d 745, 747 (Tex. Crim. App. 1972). A claim may be raised, however, if the defendant's testimony was induced by the erroneous admission of the evidence. *See Harrison v. United States*, 392 U.S. 219, 224–25, 88 S. Ct. 2008, 2011, 20 L. Ed. 2d 1047, 1052–53 (1968); *Peele*, 10 Wn. App. at 67–68. The rationale for the general rule is that the testimony may make the admission of the illegal evidence harmless error. *See id.* at 66; *see also LaRue v. State*, 137 Ga. App. 762, 764, 224 S.E.2d 837, 839 (1976); 6 LaFave, *supra*, § 11.1(c), at 19.

7.9(c) Guilty Plea

A defendant who has knowingly and voluntarily entered a guilty plea may not thereafter obtain post-conviction relief on Fourth Amendment grounds even though he or she made a timely motion to suppress in

advance of the plea. *Sanders v. Craven*, 488 F.2d 478, 479 (9th Cir. 1973); *see Tollett v. Henderson*, 411 U.S. 258, 267, 93 S. Ct. 1602, 1608, 36 L. Ed. 2d 235, 243 (1973). Because the conviction is based on the plea, the defendant cannot directly challenge the evidence. *See Sanders*, 488 F.2d at 479. But if the plea itself can be characterized as the fruit of illegally obtained evidence and, consequently, should have been suppressed upon the defendant's timely motion, then the plea was not entered voluntarily or knowingly. *See* A.E. Korpela, Annotation, *Plea of Guilty as Waiver of Claim of Unlawful Search and Seizure*, 20 A.L.R.3d 724, at *2(a) –4 (1968 & Supp. 2004). At least one state has adopted a statutory provision assuring appellate review of convictions based upon guilty pleas where evidence has been illegally obtained. *Id.* § 2(a). However, the rule in most jurisdictions is that by pleading guilty the convicted persons waive all nonjurisdictional objections to the proceedings against them, including objections to the manner in which evidence against them has been gathered. *Id.* Where a voluntary, counsel-advised plea of guilty was not upheld when attacked on the grounds that the petitioner had been the victim of unlawful search and seizure activity, the appellate court sent the case back to the trial court for a hearing on whether it had been made with knowledge of legal position and constitutional rights, without defining what constitutes, and who has the burden of establishing, such knowledge. *Id.*

7.10 HARMLESS ERROR

Even when illegally seized evidence has been improperly admitted at trial, a conviction will not be reversed if the defendant would have been convicted without its admission. *See State v. Smith*, 93 Wn.2d 329, 352–53, 610 P.2d 869, 883 (1980) (en banc); *State v. Flicks*, 91 Wn.2d 391, 396, 588 P.2d 1328, 1332 (1979) (en banc). Where an error infringes on a constitutional right, the error is presumed prejudicial, and the State bears the burden of proving the error was harmless beyond a reasonable doubt. *See State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228, 236 (2004); *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663, 670 (2003); *State v. Spotted Elk*, 109 Wn. App. 253, 261, 34 P.3d 906, 911 (2001). To make this determination, the "overwhelming untainted evidence test" has been used, meaning that the untainted evidence admitted at trial is considered to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Thompson*, 151 Wn.2d at 808.

CONCLUSION

Particulars of search and seizure law may change based upon the circumstances of each case, but the types of issues raised and considered are likely to remain much the same. An attempt has been made to expand upon basic issues by referencing additional and more recent Washington search and seizure cases. While this survey is not comprehensive and will require continual updating, we hope it will continue to be a useful tool for practitioners and judges who must assess the scope of protection that the Washington Constitution and the United States Constitution afford against unlawful searches and seizures.

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